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# In the Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-144

EFRAIN T. SUAREZ, et al.,
*Petitioners,*

*vs.*

LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida, et al.,
*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida, et al.,

*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

EFRAIN T. SUAREZ and his wife, ZENAIDA SUAREZ, Petitioners, pray that a Writ of Certiorari issue to review a Judgment of the United States Court of Appeals for the Fifth Circuit, entered April 2, 1975, rehearing denied April 30, 1975, affirming an Order of the United States District Court for the Southern District of Florida, dismissing Counts I, II, III and IV of Petitioners' Amended Complaint for damages and injunctive relief.

## OPINIONS BELOW

The opinion of the Fifth Circuit is reported in ____ F.2d ____, and is reprinted as Appendix A hereto, together with a copy of the Order denying rehearing (Appendix C).

## JURISDICTION

The Judgment of the Fifth Circuit was entered on April 2, 1975, and a Petition for Rehearing was denied on April 30, 1975. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1), and Title 42, United States Code, Section 1984.

## PREAMBLE

On June 9, 1975, this Court granted certiorari in *United States v. Janis*, October Term, 1974, Case No. 74-958, to determine whether a transferee agency, the Internal Revenue Service, may use illegally seized evidence, tainted by an illegal local law enforcement search and seizure, in a subsequently filed federal civil tax proceeding.

This case involves the opposite side of that coin, to-wit: the federal civil remedies available to the victim of the illegal local raid, as against the raiding officials and those federal officials waiting in the wings to receive and utilize copies of the illegally seized evidence in the new federal civil tax proceeding.



## QUESTIONS PRESENTED

### I

WHETHER ATTORNEYS' FEES AND COSTS, INCURRED IN DIRECT EFFORTS TO VINDICATE FEDERAL CONSTITUTIONAL RIGHTS, ARE RECOVERABLE IN A FEDERAL CIVIL ACTION FOUNDED UPON THE DECISION IN *BIVENS v. SIX UNKNOWN AGENTS*, THE REMEDIAL PROVISIONS OF THE FEDERAL CIVIL RIGHTS ACTS, AND THE INHERENT EQUITABLE POWERS OF THE FEDERAL COURTS?

### II

WHETHER 28 U.S.C. §2412 PROVIDES FEDERAL OFFICIALS, ACTING UNCONSTITUTIONALLY, WITH A COMPLETE AND ABSOLUTE IMMUNITY, AS A MATTER OF LAW, FROM ANY CLAIM FOR ATTORNEYS' FEES AND COSTS, AS DAMAGES DIRECTLY SUSTAINED BY THE VICTIM OF AN ILLEGAL INVASION OF FEDERAL CONSTITUTIONAL RIGHTS?

III

WHETHER PRINCIPLES OF FEDERAL OR STATE LAW GOVERN THE QUESTION OF ACCRUAL OF A FEDERAL CIVIL CAUSE OF ACTION UNDER *BIVENS v. SIX UNKNOWN AGENTS* AND THE CIVIL RIGHTS ACTS, AND CONTROL APPLICABILITY OF STATE STATUTES OF LIMITATION?

IV

WHETHER STATE STATUTES OF LIMITATION MAY PROPERLY BE RELIED UPON TO PEREMPTORILY BAR ANY CIVIL RECOVERY AGAINST STATE OFFICIALS IN A FEDERAL ACTION FOUNDED UPON *BIVENS v. SIX UNKNOWN AGENTS* AND THE REMEDIAL PROVISIONS OF THE FEDERAL CIVIL RIGHTS ACTS, WHERE THE UNCONSTITUTIONAL INVASIONS ARE CONTINUING IN NATURE AND WHERE THE DETERMINATION OF UNCONSTITUTIONALITY WAS NOT MADE UNTIL LESS THAN ONE YEAR BEFORE THE FILING OF THE FEDERAL ACTION FOR A CIVIL RECOVERY?



## STATEMENT OF THE CASE

In the middle of November of 1963, officials of the City of Miami Police Department and the State Attorney's Office in Dade County, Florida, decided that they would attempt to make a case against the Ayala Clinic for alleged performance of illegal abortions. The state and local officials commenced a thorough investigation, spanning some four to six weeks, prior to the scheduling of a "raid" upon the clinic.

The plan for the raid was painstakingly formulated. It included importing the assistance of two Tampa policewomen, Barbara Williams and Myrtle Ellison, to come to Miami for the operation. In fact, Barbara Williams came to Miami on December 26, 1963, and received detailed instructions [eight (8) days before the raid] from the State Attorney's Office, regarding her role.

As directed, policewoman Williams immediately returned to Tampa and called the Ayala Clinic, pretending to be a woman in need of an abortion. Williams contacted the Clinic on at least two occasions and finally made an appointment for surgery on the morning of January 3, 1964.

The day before the raid, policewoman Williams returned to Miami and executed an affidavit for the State Attorney's Office. Additionally, Williams met with the assistant chief of the Miami Police Department, the commanding officer of the internal security squad of the same department and the State Attorney's special investigator, Michael Daugherty, for a strategy session. A taxicab was rented to carry the Tampa women to the Ayala

Clinic, and a Miami police officer was scheduled to do the driving. Also, policewoman Williams was given $1,000.00 in recorded, marked bills.

Significantly, despite the long investigation and meticulous preparation, utterly no attempt was made by public officers to obtain an arrest warrant for Petitioner, EFRAIN T. SUAREZ (hereinafter referred to as Dr. Suarez), or a search warrant for the Ayala Clinic. Yet, there was somehow time to call for television coverage of the raid.

On January 3, 1964, *following a constitutionally inadequate announcement*, a combined raiding force, consisting of the City of Miami police and personnel from the State Attorney's Office, forcibly entered the Ayala Clinic and arrested Dr. SUAREZ, who was on the premises at the time. During the course of an extensive search, without proper warrant, certain Clinic records were seized by state and municipal officers.

Michael Daugherty took custody of the records, immediately transporting same to his office. Upon arrival at the State Attorney's Office, there was waiting for Daugherty a call from the Internal Revenue Service (hereinafter referred to as I.R.S.), the agency having obviously been apprised of the scheduled raid. As soon as was possible during that same week, Daugherty met with officials of the I.R.S. and *turned over to them a complete set of the illegally seized records.*

Dr. SUAREZ was thereafter tried in State Criminal Court for charges connected with the raid and seizure of documents. He was convicted in January of 1965, despite



pre-trial efforts to obtain suppression of the evidence, and was sentenced to a term in the State Penitentiary.

Dr. SUAREZ then prosecuted an appeal to the Third District Court of Appeal of Florida, which affirmed his conviction in 1966. Subsequently, both the Florida Supreme Court and the United States Supreme Court declined to grant certiorari and review the conviction.

On May 2, 1968, Dr. SUAREZ unsuccessfully endeavored to obtain an original Writ of Habeas Corpus from the Florida Supreme Court. However, once again, he was denied relief. His stays having been exhausted, he surrendered to state officials and began to serve his term of imprisonment.

Next, Dr. SUAREZ engaged the undersigned counsel to seek extraordinary post-conviction relief. This was commenced by first filing a motion under state practice [Rule 1.850 of the Florida Rules of Criminal Procedure] requesting that the state court vacate or set aside the conviction on federal constitutional grounds, it obviously being founded upon an erroneous recognition of tainted evidence. Post-conviction relief was, however, denied by the state trial court. An appeal of the trial court's Order, within the state appellate system, once again was futile, the Third District Court of Appeal of Florida dismissing the cause on March 4, 1969.

On January 31, 1969, having clearly exhausted his state remedies, Dr. SUAREZ filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Florida. There, Petitioner was finally successful in obtaining vindication of his constitutional

rights, the District Court entering, on August 6, 1969, an Order Granting Petition for Writ of Habeas Corpus. (App. F). As of this date, Dr. SUAREZ had served more than a year of his illegal state sentence. Additionally, he had suffered a brutal, unwarranted beating, at the hands of other inmates, while supposedly in the protective custody of state prison officials.

The grounds for the successful federal habeas corpus action were simple. The District Court readily determined that the state and municipal officers, who forcibly broke and entered the premises in question, without warrant, had made a constitutionally inadequate announcement—not stating their identity and purpose—prior to consummation of this long planned raid. The entry having been improper, the search and seizure was thereby irreversibly tainted.

The State of Florida, Respondent in the habeas corpus proceeding, filed lower court motions, seeking to unearth the Order Granting Petition for Writ of Habeas Corpus, but each of its efforts was unsuccessful. No appeal was lodged from the District Court's finding of illegal entry, illegal search and seizure, and consequent violations of the constitutional rights of Dr. SUAREZ, and the determination, in due course, became final, not subject to challenge on any level.

The federal habeas corpus Order granted Florida a reasonable period of time within which to retry Dr. SUAREZ, without, however, relying upon illegally seized evidence. Some six months after the successful habeas corpus action, Dr. SUAREZ not having been retried by the State of Florida, applied, upon substantial notice, for



a ruling from the District Court that a reasonable retrial term had expired. The State of Florida appeared at the hearing designated for this motion and unequivocally announced that it did not intend to retry the doctor, whereupon the District Court entered its Order fixing and determining expiration of the retrial time and finding that a reasonable term had, in fact, expired. (App. G).

While Dr. SUAREZ was engaged in these extensive efforts, first as an accused, then as a convicted defendant and finally as an incarcerated prisoner, to obtain relief from the criminal conviction, the I.R.S. was preparing to assert both a civil tax deficiency and a fraud penalty against the doctor and his wife for the years 1963 and 1964. The initial decision to include a fraud penalty in the claim against Petitioners was eventually reconsidered by the I.R.S., from a tactical standpoint, since the assertion of a fraud penalty in the Tax Court would have placed the burden of proof upon the Commissioner. Thus, in April of 1967 the Commissioner sent a thirty-day letter to Petitioners, claiming a $750,000.00 civil tax deficiency, plus a simple negligence penalty. The negligence penalty would not change the taxpayer's ordinary burden of proof. In response, Petitioners filed a proceeding in the Tax Court of the United States (Docket No. 4196-67) to contest the deficiency.

The Tax Court case was originally calendared for trial in Miami, Florida, in early 1968. However, rather than proceed to trial in defense of the deficiency assessment, the Commissioner of the I.R.S. moved on May 20, 1968, in the Tax Court, that the tax case be continued, *to await the outcome of the post-conviction attacks by Dr.*

*SUAREZ upon the search and seizure.* It was apparent to all concerned (and the I.R.S. so stipulated) that the Commissioner's leads and evidence had come *solely* from the illegal raid and unconstitutional search and seizure, and, thus, I.R.S. officials concluded that, for their own protection, the hearing upon the civil deficiency claim should be deferred, pending an ultimate court ruling regarding application of the exclusionary rule to the documents and papers illegally seized. In keeping with his wait-and-see attitude, the Commissioner twice again requested and obtained postponement of the Tax Court case, in the Fall of 1968 and the Spring of 1969.

Some thirty (30) days following entry of the habeas corpus Order on August 8, 1969, obviously disturbed by the District Court finding that the evidence in question was tainted by an unlawful search and seizure, federal tax officials completely changed their tactics. No longer content to rely on the determination in the criminal proceeding, they boldly resolved to modify their approach and proceed to seek independent enforcement of the tax deficiency, despite their sole reliance upon tainted evidence and despite the finding of the federal judge in habeas corpus.

By this time, however, Dr. SUAREZ had begun efforts to obtain return of the illegally seized property from state, local and federal officials, by filing a formal motion before the federal District Court Judge on April 24, 1970. Dr. SUAREZ sought to invoke the balance of the jurisdictional power of the federal court in habeas corpus, under 28 U.S.C. §2254, to compel return of the tainted evidence, originals and all copies, as part of the full and complete relief assured by the habeas corpus statute.



By Order on Motion for Return of Illegally Seized Property, the District Court Judge, on May 6, 1970, specifically reserved ruling on the application (indicating, however, favorable reception), so as to allow the Petitioner, under comity principles, to initially apply to the state criminal court for entry of an appropriate order as to the suppressed evidence. Moreover, in the state court system, a specific statutory provision was applicable, setting forth the procedure for return of illegally seized property. FLA. STAT. §933.14.

The state Criminal Court of Record, on May 22, 1970, duly entered an Order directing the return of the property seized. Said Order provided as follows:

> ORDERED and ADJUDGED that the State of Florida, its attorneys, investigators, agents, agencies, and representatives, and any persons in privity with any of them, be and they shall forthwith return to the within Defendant, EFRAIN T. SUAREZ, through his counsel of record herein, Stanley J. Bartel, Esquire, 341 Pan American Bank Building, Miami, Florida, all books, records, papers, documents and other items seized, and any and all copies of the same, excluding only photographs made during or after said raid.

(App. H).

On that same day, after a tracing of the property disclosed the state's January 1963 turnover to federal tax investigators, a formal demand was made upon the I.R.S. for return of all portions of the evidence held to have been illegally seized. (App. I). Despite Dr. SUAREZ's

constitutional entitlement to be returned to *status quo ante* as to all property taken, in further violation of the rights of Petitioners, the I.R.S. stubbornly refused to comply with the court Order of May 22, 1970, as well as the doctor's own formal demand for return of the evidence. Instead, the I.R.S. obstinately responded by serving a retaliatory subpoena upon counsel for Dr. SURAEZ, directing production before the Tax Court of the originals of the same documents illegally seized by state and local officers.

Federal officials having obstinately refused to return the illegally obtained property, on June 5, 1970, the State Criminal Court of Record Judge directed to the federal officials an Order to Show Cause why they should not be held in contempt of court. (App. J). However, in keeping with their firm resolution to retain the property of the doctor, at all costs, federal officials declined to respond to the Order to Show Cause and, rather, removed the entire state criminal case, pursuant to 28 U.S.C. §1442, to the federal District Court on June 9, 1970, effectively staying all further proceedings in the state criminal case. (App. K).

Dr. SUAREZ, faced with an unrelenting insistence by the I.R.S. upon use of tainted evidence, initiated a two-pronged attack in the federal District Court of the Southern District of Florida. The doctor once again requested that the federal District Judge act upon his earlier motion for return of the illegally seized property and grant full relief under 28 U.S.C. §2254, by enjoining illegal use of the tainted evidence and directing immediate return of same. Simultaneously, Dr. SUAREZ and his wife filed a new civil suit in federal court, founded upon the Fourth and Fifth Amendments of the United States Constitution



on one hand and the federal Civil Rights Act on the other, seeking injunctive relief of the same nature and, in addition, seeking a recovery of civil damages. (App. D). [Jurisdiction of the federal District Court was invoked under 28 U.S.C. §§1331, 1340, 1343, 1346, 1357.]

The District Court, in a simultaneous hearing of both the habeas cause and the civil suit, initially granted a temporary injunction, indicating, quite explicitly, its reasons, as follows:

> ... I am going to grant the motion for a temporary injunction as ancillary in order to enforce my habeas corpus order, and I am going to rule that, in addition thereto, in an action of this sort, although it is civil in nature, it essentially partakes of at least the forefeiture provision in that it seeks to attempt to collect a penalty, and it is also quasi-criminal in that it might conceivably lead to a criminal prosecution and, therefore, both the Fourth and Fifth Amendments are involved.
>
> I will rule that the use of any evidence obtained in this illegal search and seizure or any leads or other materials obtained therefrom are enjoined in that they violate the plaintiff-petitioner's constitutional rights.
>
> • • •
>
> GOVERNMENT COUNSEL: And may I ask you, you are restraining the tax court from proceeding?
>
> THE COURT: No, sir, I am not restraining the tax court at all. I am ruling that the evidence

> was unconstitutionally and illegally received. And I am holding that it is illegal for any person to use that evidence or any leads obtained from it in any criminal or civil proceeding of any nature so far as this particular person is concerned. . . .

At this juncture, the District Court having indicated its position, government counsel pointed out that the government had not been given an opportunity to present formal motions to dismiss the civil action and to argue jurisdiction. The District Court, in proper response, indicated that Dr. SUAREZ would be granted a temporary injunction, but that the government would be immediately heard on a motion to vacate and upon motions contesting jurisdiction.

Within a few days, the District Court held a hearing upon defense motions to dismiss the civil complaint of Petitioners, and, once again, considered the propriety of injunctive relief. At the conclusion of this second hearing, the District Court surprisingly reversed its position, vacating its prior rulings and dismissing Counts I, II, III and IV of Petitioners' Amended Complaint, stating it would grant no injunctive relief so long as the Tax Court was willing to hear the deficiency case. (App. E).

At this stage of the within discussion, it should be pointed out that all three of the pending federal actions —habeas corpus, the removed state criminal proceeding, and the civil claim for injunctive relief and damages— were consolidated (Order of Consolidation of July 8, 1971) and, yet, the District Court declined, under each and every theory presented, to direct return of the evidence adjudged to have been illegally seized. This was so, notwithstanding that the federal officials were in clear privity with the state officials as to the illegally seized evidence and, further, notwithstanding the stipulation of record, by federal officials, that the *sole source* for their tax deficiency was the very evidence held by the court, in the criminal proceeding, to have been illegally seized.



Thus, Petitioners prosecuted an appeal to the Fifth Circuit Court of Appeals, asserting the trial court erred in dismissing the Amended Complaint and declining to enjoin use of the tainted evidence by I.R.S. officials.

While the Fifth Circuit appeal was pending, the Tax Court considered pretrial motions, filed by Dr. SUAREZ and his wife, to suppress use of the tainted evidence in the Tax Court. Significantly, the Tax Court ruled on Auguest 10, 1972, in an opinion totally consistent with the findings of the federal court in the habeas corpus action, that the evidence in question was is fact tainted and was, thus, inadmissible, as the product of an unconstitutional search and seizure. For the convenience of this Court, a copy of the 1972 Tax Court opinion has been reproduced in Appendix II, as App. M. In keeping with the 1972 opinion, the Tax Court entered its pretrial Order of August 16, 1972, suppressing the illegally seized evidence. This Order is also reproduced in Appendix II hereto, as App. N.

It appearing that the Commissioner of the I.R.S. had utterly no evidence in support of the deficiency assessment, save tainted forms, the Tax Court entered a final Order on March 26, 1974, finding in favor of Petitioners in their challenge of the deficiency assessment and civil penalty.

A copy of the March 26, 1974, final decision of the Tax Court is reproduced in Appendix II, for the convenience of the Court, as App. O.

The Commissioner thereupon prosecuted an appeal from the Tax Court to the Fifth Circuit Court of Appeals (Case No. 74-2663). However, it became apparent to the I.R.S. that, in light of recent cases in the Seventh and Ninth Circuits, ruling that tainted evidence may not be used in a civil tax proceeding, the agency had no meritorious appeal in a cause involving exclusively tainted evidence. Having carefully considered the decisions in *Janis v. United States* [Case No. 73-226 (9th Cir. 1973)] and *Romanelli v. Commissioner* [466 F.2d 872 (7th Cir. 1972)], the Commissioner elected to proceed no further with the agency's appeal. Thus, on December 2, 1974, the Fifth Circuit dismissed the appeal of the Tax Court decision, rendering final the Tax Court determination. Thus, as insisted by Petitioners all along, the transferee federal officials, the I.R.S., could not utilize the fruits of an illegal search and seizure as the sole basis for a civil tax proceeding.

The ruling of the Tax Court, once finalized by dismissal of the Commissioner's appeal, effectively rendered moot those points in the Fifth Circuit Brief of Petitioners, directed to the issues of privity [whether transferees are bound by the adjudication of illegality in the criminal proceeding] and entitlement to injunctive relief [where all of the evidence is tainted]. (App. A). Nevertheless, when the Fifth Circuit appeal was finally scheduled for argument and resolution, the matter of dismissal of the Amended Complaint of Petitioners, for recovery of damages incurred



in vindication of constitutional rights, remained before the court for determination.

To further clarify the issues before the Fifth Circuit, it should be pointed out that Count V of Petitioners' Amended Complaint [involving the prison beating of Dr. SUAREZ] had been amicably settled. Additionally, it is pertinent that Count IV of the Amended Complaint (claim for false imprisonment) has been abandoned by Petitioners. Thus, the appeal below centered upon Counts II and III of the Amended Complaint, which set forth causes of action against federal, state and local officials under the federal Civil Rights Acts, *Bivens v. Six Unknown Agents*, and the equitable jurisdiction of the federal courts, for violations of constitutional rights.

Despite the complex course of events reflected within this detailed statement of the case (necessary to a complete understanding of the continuing abuses Petitioners have been caused to suffer *for some eleven (11) years*), the Fifth Circuit has concluded, as did the trial court, that federal law affords absolutely no civil remedy to Petitioners, so as to truly return them to the *status quo ante*, following the illegal raid.

The decision under scrutiny here was founded upon three simple grounds:

A. Civil damages, in the form of attorneys' fees and costs, as incurred in direct efforts to vindicate constitutional rights, are not recoverable against public officers under the federal Civil Rights Acts, the cause of action established in *Bivens v. Six Unknown Agents*, and the equitable powers of the federal courts. (App. A).

B. Federal officers are immunized from an award of civil damages by 28 U.S.C. §2412, despite the federal Civil Rights Acts, *Bivens v. Six Unknown Agents*, and the equitable powers of the federal courts. (App. A).

C. State statutes of limitation may be relied upon by the federal District Court to deny a claimant recovery against state officials, in a federal civil action founded upon *Bivens v. Six Unknown Agents*, the federal Civil Rights Acts, and the equitable jurisdiction of the federal courts. (App. A).

The conclusion and decision of the Fifth Circuit, on the points presented, is in direct conflict with the decisions and holdings of this Court and other Courts of Appeal in this country, which permit a recovery of attorneys' fees and costs, as damages, under the theories properly pled within the Amended Complaint of Petitioners, state statutes of limitation and immunity principles notwithstanding. Thus, important questions of federal law have been framed for this Court's examination.



## REASONS FOR GRANTING THE WRIT

### I

ATTORNEYS' FEES AND COSTS, INCURRED IN DIRECT EFFORTS TO VINDICATE FEDERAL CONSTITUTIONAL RIGHTS, ARE RECOVERABLE IN A FEDERAL CIVIL ACTION FOUNDED UPON THE DECISION IN *BIVENS V. SIX UNKNOWN AGENTS*, THE REMEDIAL PROVISIONS OF THE FEDERAL CIVIL RIGHTS ACTS, AND THE INHERENT EQUITABLE POWERS OF THE FEDERAL COURTS.

The United States Constitution holds inviolate that fundamental right of all citizens of this country to be secure in their persons and property against unreasonable and seizures:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. When federal officials invade this basic, primary right by conducting an unlawful and unreasonable search and seizure, and engaging in acts which are in complete derrogation of one's entitlement to privacy, federal common law provides the violated citizen with a mechanism for redress of his injuries, a civil cause

of action for damages. *Bivens v. Six Unknown Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971).

Similarly, federal statutory law has made provision for civil recovery of damages against public officers, who, acting under color of law, violate the Fourth Amendment right of a citizen:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1938. While 42 U.S.C. § 1983, the most noted provision of the Civil Rights Acts, deals basically with "deprivation" of constitutional rights, it is important to note, in light of the Amended Complaint of Petitioners, that conspiracies aimed at infringement upon constitutional rights will also give rise to a civil claim. 42 U.S.C. § 1985. (App. L).

Despite the quite liberal provisions of federal law, above presented, permitting recovery of money damages from public officials who violate the constitutional rights of citizens, the Fifth Circuit Court of Appeals has concluded, in the instant cause, that there is "no basis on which attorneys' fees could be allowed in this kind of action" against state, local and federal officials. Thus, in



affirming the District Court's dismissal of Petitioners' Amended Complaint, the Fifth Circuit has ruled that costs and attorneys' fees incurred in direct efforts to vindicate constitutional rights may not be awarded under *Bivens v. Six Unknown Agents*, the Civil Rights Acts, and even the equitable jurisdiction of the federal courts. While this Supreme Court has not previously had occasion to treat this question, the ruling of the Fifth Circuit stands out, among the many federal decisions on the issue, as one in bold conflict with what appears to be the prevailing trend.

Initially, it should be pointed out that federal courts called upon to construe the remedial provisions of the Civil Rights Acts have uniformly held that award of attorneys' fees and costs in favor of one who has been deprived of civil rights is proper and, in fact, ordinary, "unless special circumstances would render such an award unjust." *Thonen v. Jenkins*, 374 F.Supp. 134 (E.D. N.C. 1974); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Gilpin v. Kansas State High School Activities Assn.*, 377 F.Supp. 1233 (D. Kan. 1974). Importantly, federal courts have decided that where a significant public interest is involved, award of attorneys' fees and costs is necessary to render the remedy under the Civil Rights Acts "effective." *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974). If a trial court declines to award attorneys' fees in a civil rights action, it has been held that there must be "an affirmative, articulated reason for the denial." *Stanford Daily v. Zurcher*, 366 F.Supp. 18 (N.D. Cal. 1973).

Award of attorneys' fees in a civil rights case, or a *Bivens* type cause, is frequently viewed as a prerequisite to return of the damaged citizen to the status quo. Where

a party has been subjected to unnecessary, costly, time consuming and protracted litigation, in order to vindicate fundamental and well established rights, recent cases permit recovery of attorneys' fees, in order that one might be made whole. The aim is to "shift the financial burden" to the shoulders of the government officials, upon which it properly belongs. *Stanford Daily v. Zurcher*, 366 F.Supp. 18 (N.D. Cal. 1973); *First National Bank v. Dunham*, 471 F.2d 712 (8th Cir. 1973); *Monroe v. Board of Commissioners of Jackson*, 453 F.2d 259 (6th Cir. 1972); *Class v. Norton*, 505 F.2d 123 (2d Cir. 1974).

Often, appellate courts ground an award of attorneys' fees on public policy. According to the Third Circuit Court of Appeals, "withholding an award of attorneys' fees in a case where a constitutional violation has been established removes a substantial incentive toward efforts looking to vindicate constitutional rights." *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31, 44 (3d Cir. 1974). Thus, attorneys' fees and costs are permitted not only to make the client whole, but to encourage direct efforts to enforce and protect constitutional rights. *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 484 F.2d 1331 (1st Cir. 1973); *Council of Organizations on Philadelphia Police Accountability & Responsibility v. Tate*, 60 F.R.D. 615 (E.D. Pa. 1973).

Perhaps, the Second Circuit Court of Appeals has most eloquently set forth the primary justification for award of attorneys' fees and costs as incurred in efforts to vindicate constitutional rights:



> Rather, the objective is to assure that the plaintiff, and others who might similarly be forced to great expense to vindicate clear constitutional claims, are not deterred from securing such vindication by the prospect of costly, protracted proceedings which have become necessary only because of the obdurate conduct of the defendants.
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> When, as here, the constitutional right is one of great importance and proof of an intentional and serious violation is clear and definite, enforcement should not be inhibited by reason of litigation costs.

*Stolberg v. Members of the Board of Trustees for the State Colleges of Connecticut*, 474 F.2d 485 (2d Cir. 1973); *accord*, *Hoitt v. Vitek*, 495 F.2d 219 (1st Cir. 1974).

Where the entire class of citizens has benefited from an effort to vindicate fundamental rights, it would be unjust to cause a crusader to suffer the entire expense of his noble efforts. *Counsel of Organizations on Philadelphia Police Accountability & Responsibility v. Tate*, 60 F.R.D. 615 (E.D. Pa. 1973).

Significantly, an award of attorneys' fees and costs has been held to be particularly appropriate under *Bivens*, the Civil Rights Acts and the equitable jurisdiction of the federal courts, where extensive and protracted litigation has been required, as in the instant cause, to *vindicate one's constitutional right to be free from illegal searches and seizures. Stanford Daily v. Zurcher*, 366 F.Supp. 18 (N.D. Cal. 1973); *Lykken v. Vavreck*, 366 F.Supp. 585 (D. Minn. 1973); *McArthur v. Pennington*, 253 F.Supp.

420 (E.D. Tenn. 1963); *United States. v. Koelzer*, 457 F.2d 892 (3d Cir. 1972). The language of the Fourth Amendment decisions is uniform:

> While various rationales have been given for including attorneys' fees as costs, the courts are in essence making a judgment that including attorneys' fees as costs is an additional remedy necessary to effectuate the Congressional underpinnings of a substantial program.
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> The Court in *Bivens* held that in order to protect encroachment by federal officers on rights protected by the Fourth Amendment, it was necessary to imply a particular remedial mechanism, that is, suits for damages.
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> "These [Fourth Amendment rights], I protest, are not mere second-class rights, but belong in the catalog of indispensable freedoms. Among the deprivation of rights, none is so effective in cow ing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."
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> Where as here fee shifting is necessary to insure the vindication of important constitutional rights and appropriate because of the inadequate remedies otherwise available, because it is consistent with a remedy increasingly furnished by Congress, and because of the high social value placed upon the rights involved, an award of attorneys' fees as costs is essential, lest these important rights be relegated to a mere platitude.



*Stanford Daily v. Zurcher*, 366 F.Supp. 18, 24-25 (N.D. Cal. 1973).

Also, federal courts have held that attorneys' fees and costs are especially merited in those cases wherein the public officers complained of have acted in bad faith, vexatiously, w a n t o n l y, unreasonably, obstinately, and oppressively. *Thonen v. Jenkins*, 374 F.Supp. 134 (E.D. N.C. 1974); *Diamond Shamrock Corp. v. Lumbermen's Mutual Casualty Co.*, 466 F.2d 722 (7th Cir. 1972); *Gilpin v. Kansas State High School Activities Assn., Inc.*, 377 F.Supp. 1233 (D. Kans. 1974); *Monroe v. Board of Commissioners of the City of Jackson*, 453 F.2d 259 (6th Cir. 1972); *Class v. Norton*, 505 F.2d 123 (2d Cir. 1974). And, it should be pointed out that such bad faith, unreasonableness, obstinacy, and obdurateness may be reflected within not only the initial invasion of a constitutional right, and immediate turnover of tainted evidence to federal officials as well, but *in the subsequent co duct of the litigation, with full knowledge of infringement of constitutional rights*, as is immediately noted with regard to the I.R.S. in this cause. *Hall v. Cole*, 93 S.Ct. 1943 (1973).

Clearly, in light of the foregoing principles of law, the official conduct under scrutiny in this case not only merits, but would compel, an affirmative award of attorney's fees and costs to Petitioners, assuming the factual allegations of the Complaint are proven, as the trial court must on hearing a motion to dismiss. The key points of the cause of Petitioners against federal, state and local officials, are as follows:

A. On January 3, 1964, Petitioner, EFRAIN T. SUAREZ, was subjected to an illegal entry, search and seizure, conducted by the State Attorney's Office in Dade County, Florida, and the City of Miami Police Department.

B. State and local officials were fully apprised of proper procedures for obtaining warrants and securing access to private property, but in bold disregard of the rights of Petitioner, EFRAIN T. SUAREZ, declined to follow proper, established procedures and conducted a warrantless raid with an illegal entry.

C. State and local public officers immediately delivered copies of the illegally seized evidence to federal officials, who were aware, at all times, of the circumstances surrounding the illegal raid, search and seizure.

D. Federal officials proceeded to assert a tax deficiency against Petitioners, with full knowledge that the sole basis for same was the illegally seized evidence. They waited, they hoped, for a holding of legality in the post-conviction proceedings, but then, when illegality was found, they reversed their field.

E. Federal officials then boldly flouted state court orders requiring return of the tainted documents, further infringing upon the constitutional rights of Petitioners.

F. Despite a federal court determination that the evidence in question was improperly seized, and a concession that it was the sole basis for the deficiency assessment, federal officials continued to utilize same in the Tax Court. Federal officials also strenuously and obstinately imposed further on Petitioners by refusing to litigate the



privity question, as a pure question of law in the action below, and instead insisted on a trial *de novo* of the search and seizure, including the facts surrounding the raid, in the Tax Court. Then, when the Tax Court concluded the case, no new evidence had been adduced by the federal officials. Only thousands of dollars more in costs and fees had been inflicted on Petitioners.

G. At no time did state or local officials take any action to retrieve the tainted evidence they delivered to third parties, rendering the invasion upon the rights of Petitioners one continuing in nature.

H. Eventually, the Tax Court determined that the evidence in question was illegally seized [a matter which should have been readily held *res judicata*] and that it had been improperly relied upon by the I.R.S. to assert a tax deficiency.

I All public officials knowingly violated the constitutional rights of Petitioners.

J. All officials in question continually conspired to deny Petitioners their constitutional rights.

While Petitioners have set forth herein a summary of the factual and procedural allegations supporting their cause, they would emphasize that the Amended Complaint contains abundant allegations of fact to require treating them as true for purposes of this case. Petitioners sought, on the trial level, not momentous general damages, but merely a civil recovery of substantial attorneys' fees and costs, incurred in an eleven-year effort to vindicate constitutional rights. There being clear legal bases for recovery of attorneys' fees and costs, the Fifth Circuit Court of

Appeals erred in affirming the dismissal of the Amended Complaint. *Bethea v. Reid*, 445 F.2d 1163 (3d Cir. 1971). The Fifth Circuit having ruled that there can be no cause of action for attorneys' fees and costs under *Bivens*, the Civil Rights Acts, and the common law jurisdiction of the federal courts, an important question of federal constitutional, statutory and case law has been framed for consideration by this Court.

## II.

CLEARLY, 28 U.S.C. §2412 DOES NOT PROVIDE FEDERAL OFFICIALS, ACTING UNCONSTITUTIONALLY, WITH A COMPLETE AND ABSOLUTE IMMUNITY, AS A MATTER OF LAW, FROM ANY CLAIM FOR ATTORNEYS' FEES AND COSTS, AS DAMAGES DIRECTLY SUSTAINED BY THE VICTIM OF AN ILLEGAL INVASION OF FEDERAL CONSTITUTIONAL RIGHTS.

According to controlling precedent of this Supreme Court and other federal appellate courts, neither federal, nor state and local public officers have an absolute immunity from suit for an illegal arrest or an unreasonable search and seizure. *Scheuer v. Rhodes*, 94 S.Ct. 1683 (1974); *Wood v. Strickland*, 43 U.S.L.W. 4294 (U.S. Supr. Ct. Feb. 25, 1975); *Bivens v. Six Unknown Agents*, 403 U.S. 338, 91 S.Ct. 1999 (1971); *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974); *Jones v. Perrigan*, 459 F.2d 81 (6th Cir. 1972); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972); *Butler v. United States*, 365 F.Supp. 1035 (D. Hawaii 1973); *Tritsis v. Backer*, 355 F.Supp. 225 (N.D. Ill. 1973).



The foundation for denial to public officials of the immunity shield, in a civil action founded upon invasion of Fourth Amendment rights, has been held to be "the superior authority" of the Constitution. When a state or federal officer acts, under color of law, in a manner violative of the federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Scheuer v. Rhodes*, 94 S.Ct. 1683 (1974); *Bivens v. Six Unknown Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971).

In affirming the trial judge's dismissal of the Amended Complaint of Petitioners, the Fifth Circuit below ruled that the "federal defendants are immunized from an award of attorneys' fees by provisions of 28 U.S.C. §2412":

§2412. Costs.

Except as otherwise specifically provided by Statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be

> as provided in §2414 and §2517 of this title for the payment of judgments against the United States.

(App.A). Boldly disregarding well established precedent in *Bivens* and civil rights actions, as above set forth, the Fifth Circuit relies upon a single previous decision of its own, *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department* to apply 28 U.S.C. §2412 to the instant cause. 496 F.2d 1017 (5th Cir. 1974).

Significantly, as the Fifth Circuit pointed out, in *San Antonio*, all parties "conceded" that federal officers were immunized from an award of attorneys' fees by the provisions of 28 U.S.C. §2412. In the instant cause, there was never such an admission or stipulation by the parties to the Fifth Circuit appeal.

Further, an examination of 28 U.S.C. §2412 and legislative history immediately reveals that its purpose was and is not to immunize federal officers from civil recoveries of attorneys fees for conduct violative of constitutional rights. Rather, it was Congress's intent and purpose, in enacting 28 U.S.C. §2412, merely to "correct the disparity" between private litigants and the United States in terms of award of costs and to provide for "uniformity of treatment in the award of costs." *United States v. 12.85 Acres of Land*, 312 F.Supp. 651 (E.D. Tenn. 1971); U.S. Code Congressional and Administrative News, pp. 2528-29 (1966).

The Fifth Circuit's decision in this case, extending 28 U.S.C. §2412 to a *Bivens* cause and an action founded upon the Civil Rights Acts, contravenes legislative intent



and serves to defeat totally the judicial purpose for award of attorneys' fees, as expressed in Reason I, encouragement of actions by citizens to vindicate invasions by public officers upon constitutional rights.

While a narrow construction of 28 U.S.C. §2412, based upon legislative intent, might render unnecessary a constitutional attack upon said statutory provision, Petitioners would respectfully take the position that the Act is unconstitutional, if it in fact serves to prohibit a recovery of attorneys' fees in a suit based upon *Bivens* or the Civil Rights Acts. This Court having determined that "the superior authority" of the Constitution preempts any immunity in favor of public officials, where constitutional rights have been violated, 28 U.S.C. §2412, to the extent the Fifth Circuit construes same to create an immunity, must be found to be unconstitutional upon the same principle of superior authority of the Constitution. Surely, this Court does not and cannot sanction legislative attempts to subvert constitutional rights, by immunizing federal officials from liability for damages, in the form of attorneys' fees, incurred by citizens who have been subjected to unconstitutional invasions.

Finally, petitioners would point out that two qualifications within 28 U.S.C. §2412 properly apply to the instant case, rendering the Act inapplicable. First of all, the initial clause of the section — "except as otherwise specifically provided by statute"— may properly be construed to render §2412 preempted by 42 U.S.C. §1983, the "damages" term in the Civil Rights Act being uniformly construed to properly permit recovery of attorneys' fees and costs.

Secondly, the "immunity provisions", if any, of 28 U.S.C. §2412 are stated to be applicable only to an agency or official "acting in his official capacity". Significantly, a public official is deemed, under the cases presented within this question and the previous question, to have exceeded proper authority, or to have arbitrarily and grossly abused powers, thus stripping himself of any immunity, where such officer has been engaged in an unconstitutional invasion of civil rights. Consequently, under the "official capacity" language of §2412, the statute should be held inapplicable to a cause founded on *Bivens v. Six Unknown Agents* and the Civil Rights Acts. The law mandates that an official engaged in infringement of constitutional rights of others be treated as any mere lawbreaker, removing the shield of any immunity, and, thus, 28 U.S.C. §2412 can afford no absolute protection.

The Fifth Circuit's strained interpretation of 28 U.S.C. §2412 stands to have a tremendous impact upon federal civil actions for recovery of damages under *Bivens* and the Civil Rights Acts. Broad and hasty application of the Act, to immunize federal officials from civil recovery of attorneys' fees, clearly stands to have a chilling effect upon efforts by citizens to seek vindication of federal constitutional rights. Therefore, a significant federal statutory and constitutional issue appears open for this Court's examination and resolution.



## III

## PRINCIPLES OF FEDERAL LAW, AS OPPOSED TO STATE LAW, GOVERN THE QUESTION OF ACCRUAL OF A FEDERAL CIVIL CAUSE OF ACTION UNDER *BIVENS v. SIX UNKNOWN AGENTS* AND THE FEDERAL CIVIL RIGHTS ACTS, AND CONTROL APPLICABILITY OF STATE STATUTES OF LIMITATION.

As a general proposition, an action created by federal law, whether statutory or common law, is properly governed by federal, not state, substantive principles. *Lauderdale v. Smith*, 186 F.Supp. 958 (E.D. Ark. 1960). Significantly, this important concept has been specifically held to be applicable to actions aimed at "vindication of federal civil rights guaranteed by the Constitution." *Martin v. Duffie*, 463 F.2d 464 (10th Cir. 1972); *Pritchard v. Smith*, 289 F.2d 153 (8th Cir. 1961).

In the instant cause, the Fifth Circuit, in a bald statement of holding, affirmed at trial court application (via dismissal of the Amended Complaint) of a three year Florida limitation period to bar assertion of a civil rights action against state and local officers under *Bivens v. Six Unknown Agents* and the Civil Rights Acts:

> He claimed against the state officials as well, but it is clear that any claim against them ... would be barred by the Statute of Limitations.

(App. A). See FLA. STAT. §95.11. The Fifth Circuit declined completely to set forth its rationale and the legal bases, if any, for its conclusion.

Initially, it should be pointed out, therefore, that there are no legislated limitations, federal or state, applicable to federal civil actions prosecuted under *Bivens* and the Civil Rights Acts. Consequently, according to prevailing federal law, rather than boldly deferring to a very general state limitation provision, the federal courts must "fashion the governing rule" according to "their own standards", being primarily concerned with "divining and effectuating" federal policies. 1 J. MOORE, FEDERAL PRACTICE, ¶0.322-0.328; *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573 (1943); *Pritchard v. Smith*, 289 F.2d 153 (8th Cir. 1961). While federal courts may look to state statutory and case law for guidance, it must be emphasized that state law may not be relied upon to fill the interstices where it serves to defeat federal policies, by effectively and uniformly destroying a federal cause of action, normally vigorously encouraged by the federal court system. *Id.*

The primary interest of the federal court must be to preserve the federal cause of action and the term of a state statute of limitation is only one *factor* to be considered in deciding when a right to seek civil relief for violations of constitutional protections begins and terminates.

Thus, in determining when the clock starts to run for the purpose of applying a "borrowed statute of limitation" or a common law limitation to a federally created remedy, federal, not state, law is controlling. *Charney v. Thomas*, 372 F.2d 97 (6th Cir. 1967); *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5 (5th Cir. 1967); *Kramer v. Loewi & Co., Inc.*, 357 F.Supp. 83 (E.D. Wis. 1973). Having set forth the applicable principle in one of its prior cases, *Azalea Meats*,



the Fifth Circuit elected, however, to ignore same in the instant case and quite apparently proceeded to start the limitation clock running, as regards state officials, from the time of the illegal entry and unlawful search and seizure, January 3, 1964, choosing to disregard completely federal policy, governing *Bivens* and civil rights actions, and federal principles of law regarding accrual of a cause of action.

Clearly, in civil rights cases, federal courts should use that combination of federal law, common law and state law as will be best adapted to the object of the civil rights laws, and must use common law powers to facilitate, and not to hinder, proceedings undertaken to vindicate civil rights. The Fifth Circuit relied solely upon a Florida statute of limitation to bar the claim of Petitioners, boldly declining to consider other highly relevant factors—the continuing nature of the invasion upon constitutional rights, the fact that the damages of Petitioners could not be accurately ascertained until the search and seizure in question was finally adjudged to be unlawful and until the invasions upon privacy ceased, and the policy of this Court that *Bivens* and civil rights type actions be vigorously pursued for the ultimate benefit of all citizens in this country.

Summary application of the state limitation provision, in disregard of federal policy and federal substantive principles, to deny Petitioners a forum for civil recovery of damages incurred in vindication of constitutional rights, presents itself as an important question for consideration by this Court.

## IV

STATE STATUTES OF LIMITATION MAY NOT PROPERLY BE RELIED UPON TO PEREMPTORILY BAR ANY CIVIL RECOVERY AGAINST STATE OFFICIALS IN A FEDERAL ACTION FOUNDED UPON *BIVENS v. SIX UNKNOWN AGENTS* AND THE REMEDIAL PROVISIONS OF THE FEDERAL CIVIL RIGHTS ACTS, WHERE THE UNCONSTITUTIONAL INVASIONS ARE CONTINUING IN NATURE AND WHERE THE DETERMINATION OF UNCONSTITUTIONALITY WAS NOT MADE UNTIL LESS THAN ONE YEAR BEFORE THE FILING OF THE FEDERAL ACTION FOR A CIVIL RECOVERY.

Where a civil cause of action is founded upon a search and seizure, which is being challenged in state and federal criminal and habeas corpus proceedings, the cause does not properly ripen or accrue until there is a final determination that the search and seizure was unlawful and unreasonable. Unless it is established that the search and seizure under attack was illegal, clearly, no violation of constitutional rights, such as will give rise to a civil suit under *Bivens* or the Civil Rights Acts, can be found to exist.

It seems axiomatic, so as not to require citations, that awareness of an injury is a prerequisite to accrual of a cause of action under the federal statutory and constitutional provisions herein question, which permit recovery of damages for violations by public officers of Fourth Amendment rights. Such an awareness does not arise, in



a search and seizure case, until the conduct complained of is ultimately found to be in derrogation, as a matter of law, of constitutional guidelines.

In the instant case, Petitioner, EFRAIN T. SUAREZ, was the subject of an illegal and unreasonable search and seizure on January 3, 1964. However, the raid by state and local public officials, which included an extensive search and seizure of the personal property of said Petitioner, was not adjudicated to have been wrongful until August 8, 1969, when a Federal Judge entered an Order upon Petition for Habeas Corpus, directing release of Petitioner, EFRAIN T. SUAREZ. On June 3, 1970, within one year of the habeas Order, Dr. SUAREZ and his wife filed their civil action.

As has been previously pointed out, the action of Petitioners was dismissed, with prejudice, shortly after filing, the trial court finding a three year Florida statute of limitation to bar the suit, as against state officials. The Fifth Circuit affirmed in the decision below, without setting out the grounds for its judgment. (App. A).*

In affirming, it is clear, however, that the Fifth Circuit has rejected entirely the position of Petitioners as expressed in the opening paragraph of this presentation. Petitioners would respectfully submit the position taken

*(As regards federal officials, the Fifth Circuit properly found no limitations issue, for the conduct complained about, including overt acts, was clearly ongoing at the time of the filing of the federal civil action by Petitioners. This fact is immediately apparent from examination of the posture of the Amended Complaint of Petitioners, the primary relief sought by them in Count I being injunctive—entry of an order to restrain ongoing violations of constitutional rights, more specifically, utilization of tainted evidence in violation of the silver platter doctrine.)

by the Fifth Circuit is incorrect, for the court has neglected to properly consider the totality of the factual circumstances supporting Petitioners' claim, which must be accepted as true, and has neglected to give due credence to federal policy, which encourages actions to vindicate constitutional rights.

Until entry of the federal habeas corpus order of August 8, 1969, there was no "cause of action" or claim that could be made against city and state officials for attorneys' fees and costs on account of the unconstitutional search and seizure. Absent a final adjudication of wrongfulness, binding upon the opposing party, it would be premature to seek damages for a violation of Fourth Amendment rights. As a matter of fact, had Petitioner filed this claim before the August 8, 1969, Order, certainly the accused officials would have relied upon the numerous state trial and appellate court decisions and judgments finding the raid, search and seizure to be lawful, in order to defeat the position of Petitioners, thus prejudicing their claim.

An analogy might, at this point, be drawn between actions for violation of constitutional rights and suits for wrongful injunctions. In the latter, until there is a final determination that an injunction wrongfully issued, the right of a defendant to recover civil damages, costs and attorney's fees for the infringement upon his freedoms, does not accrue. *Roger Dean Chevrolet, Inc. v. Painters, Decorators & Paperhangers of America*, 155 So.2d 422 (3d D.C.A. Fla. 1963). It seems equally clear, in the absence of a distinguishing feature which would merit a different rule, that the cause of action for violation of Fourth



Amendment rights comes into existence only upon final determination by the court that a search and seizure was unreasonable.

Nevertheless, an additional, independent ground appears for a finding that the cause of action of Petitioners was timely filed, within any state or common law limitation. Where the infringement upon constitutional rights is "continuing" in nature, statutes of limitation do not begin to run at the point of initial violation, but are properly measured from the date of termination of the invasion about which there is duly asserted a civil complaint. *Pennsylvania v. Glickman*, 370 F.Supp. 724 (W.D. Pa. 1974). The justification for this rule in Fourth Amendment cases is twofold. At the time of the initial wrong, damages are not "immediately ascertainable", but are speculative. Many years may pass before a final vindication of rights is realized in the federal courts, and the full extent of damages, specifically, attorneys' fees, expenses and costs, will not be known until that ultimate vindication. Secondly, if the invasion of rights involves property and the Fourth Amendment, the infringement does not and cannot cease until the invasion of privacy terminates with a return of the property to the injured party. See *Railing v. United Mine Workers of America*, 445 F.2d 353 (4th Cir. 1971); *Contract Buyers League v. F & F Investments*, 300 F.Supp. 210 (N.D. Ill. 1969); *Sun Oil Co. v. Vickers Refining Co.*, 414 F.2d 383 (8th Cir. 1969); *Wheeler v. Dell Publishing Co.*, 300 F.2d 372 (7th Cir. 1962).

Thus, in the instant case not only did the right to sue for the initial violation not accrue until the August 8, 1969, habeas Order, but the cause of action of Petitioners against state and local officials could not have become limitations

barred until immediately after the rendering of the Tax Court opinion on March 26, 1974, when retrieval of the property of Petitioners became finally possible. Having conducted an unlawful search and seizure and having distributed tainted evidence to other public officials, state and local officers were duty bound to retrieve the property of Petitioners and return same to them. As long as the personalty of Petitioners remained in the hands of public officials, who obstinately insisted on using same and refused to return same, the invasion of privacy and violation of constitutional rights was continuing in nature through and until 1974 and, thus, the June 3, 1970, Complaint of Petitioners certainly was barred by no Statute of Limitations, no matter how short. Petitioners respectfully submit this is the constitutionally mandated guideline which should be adopted by this Court, so that undisputed violations of constitutional rights may be duly vindicated without application of unreasonable state prohibitions and technicalities to prevent assertion of a claim.



## CONCLUSION

In *United States v. Janis*, October Term, 1974, Case No. 74-958, this Court will have the silver platter doctrine before it, for current review. At issue in *Janis* is whether the I.R.S. may wait in the wings and take custody of illegally seized documents for use in a fresh, newly constructed federal civil tax proceeding, following an unlawful search and seizure by state and local law enforcement officers.

Candidly, Petitioners in this case would hope that, on the merits, this Court in *Janis* will re-affirm the viability of the silver platter doctrine, as against a transferee agency who has used copies of the illegally seized evidence in a newly framed proceeding. To hold that the transferor cannot use the tainted evidence, but that the transferee can, does little to protect the fundamental constitutional rights of the injured party. Rather, it lays open the injured party, as in *Janis* and here, to a series of parallel, purportedly independent prosecutions by various state and federal regulatory authorities. Such a result, it is submitted, is constitutionally offensive.

Even if this Court decides the *Janis* case in favor of the Respondent, that will not, however, dispose of the equally important current issues concerning proper discipline of raiding officers, responsible for commission of the constitutional torts here involved.

Is the victim of the unconstitutional search and seizure to bear the total costs and fees incurred in vindicating himself? Is it not the meaning and intent of *Bivens v. Six Unknown Agents* and the federal Civil Rights Acts that

injured parties, having been unconstitutionally violated, be advanced, in all fairness, sufficient sums to make them whole?

It is submitted that there can be and should be no weakening of the civil rights of an injured party, in a proceeding against officials of the government for *misuse* of wrongfully seized evidence, received on a "silver platter".

On the other hand, should this Court rule for the Petitioner in the *Janis* case, and allow the use of tainted evidence by a supposedly innocent federal civil tax authority, this should in no way be construed to excuse raiding officers from their independent responsibility for having conducted an illegal raid. Indeed, if the transferee is to be permitted effective utilization of illegally seized evidence in an independent prosecution, that would seem to be all the more reason to strengthen, rather than weaken, the injured parties' civil rights as against the group of agencies who conducted the illegal raid, search and seizure, in the first instance.

In the instant case, there is a further complexity—namely, that the federal agents, here involved, have not been entirely innocent. The I.R.S. was gleefully waiting in the wings for copies of the illegally seized evidence. They used the tainted proof as the sole basis for instituting a hitherto unprosecuted "civil" tax case. Also, the agency's bad faith was demonstrated by its approach, initially seeking a fraud penalty and then later watering it down to a negligence penalty, the aim being to shift the burden of proof from the I.R.S. to Petitioners, to further aggravate the prejudice arising from the I.R.S.'s reliance upon illegally seized evidence.



The I.R.S. must have recognized for almost two years that the major battleground over the validity of the search and seizure was the criminal proceedings. Had the I.R.S. *not* felt said proceedings to be relevant, there would be no reason for the agency to initiate successive requests for continuance of the Tax Court trial.

Having lost the District Court trial, the I.R.S. continued to exert pressure upon Petitioners, by defying the state criminal court's turnover Order, by subpoenaing the defense counsel to the Tax Court trial and by refusing to adjudicate the simple, legal question of privity, either in the habeas corpus case or in the federal civil rights action below. Instead, the I.R.S. insisted that Petitioners "exhaust" their remedy before the Tax Court, requiring that they hire and pay for tax counsel to represent them in that proceeding.

The I.R.S. did not even stop here. They also insisted that Petitioners completely re-litigate the entire search and seizure issue, not only on the law, but on the facts. Thus, improper receipt, in the first instance, has been coupled here with oppressive use of the tainted evidence. Historically, the practice has been that upon a finding of illegal search and seizure of non-contraband evidence, the injured party is not only free of any wrongful prosecution, state or federal, but he is to be returned to the status quo, Thus, as in the case of the Florida statutory practice, the illegally seized evidence is to be restored to the aggrieved party. FLA. STAT. § 933.14.

That same spirit of restoration should apply in respect to the damage entitlement of the aggrieved party. In other words, where one has been subjected to an unconstitutional raid, the costs and fees of vindicating constitutional rights

should, it is submitted, be assured in a federal civil proceeding that is not encrusted with overly protective "defenses" [such as limitations or immunities]. Liberal federal standards should be here applied in order that constitutional policy be fulfilled through vigilant pursuit of civil rights invaders.

This Court has already indicated, in granting certiorari in *United States v. Janis*, that it intends to give current review to the effect of illegality upon a transferee agency's authority to use illegally seized evidence. At the same time, it is submitted, this Court should give current review to the rights of the aggrieved party, not only as against the transferee agency, but as against the transferor agents and those in privity with them.

For the above and foregoing reasons, it is respectfully prayed that this Court grant certiorari in this case. It would also be prayed that oral argument in this case be set at the same time as that in *Janis*, Case No. 74-958.

Respectfully submitted,

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By LARRY H. SCHATZ
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[Bill Shuford, Jr., of counsel on the Petition].

# APPENDIX

# I

## APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 72-1034

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EFRAIN T. SUAREZ,
joined by his wife,
ZENAIDA SUAREZ,
Plaintiffs-Appellants,

vs.

LOUIE L. WAINWRIGHT,
Director, Division of Corrections, et al,
Defendants-Appellees.

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Appeals from the United States District Court
for the Southern District of Florida

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(April 2, 1975)

Before TUTTLE, COLEMAN and SIMPSON, Circuit Judges:

TUTTLE, Circuit Judge:

We here deal with the final chapter in a tale of three lawsuits arising in the Southern District of Florida, as a result of which the original plaintiff, the appellant here, has, by action of the United States Tax Court, received full relief in the matters originally litigated but who now complains that the trial court declined to award him his attorney's fees.

Suarez has been attempting for some five years to prevent the Internal Revenue Service from utilizing copies of records which had been seized from his office on January 3, 1964 by police officers of Dade County, Florida and which had been used to produce his conviction for performing illegal abortions. The first of these efforts was made in connection with his filing a petition for release from the state court conviction by writ of habeas corpus on the ground that his conviction had been obtained by the use of the illegally seized records. Asserting that the state officials had furnished copies of the records to the Internal Revenue Service agents, he amended his petition for habeas corpus to seek an injunction against the IRS officials. He subsequently filed a second civil suit seeking an injunction against the use of evidence, based on alleged violations of his Fourth and Fifth Amendment rights.

Following the grant of the writ of habeas corpus by the federal court, Suarez was released from his state conviction and was not brought to trial a second time. Thereupon the state court issued an order directing all officers, both state and federal, to surrender the records and all copies thereof to the plaintiff. Upon the failure of the Internal Revenue officials to return the copies that they possessed criminal contempt proceedings were filed in the state court against the federal officials. This case was removed to the federal court, and this became the third prong of the litigation which we now bring to a close. Claims for damages against the state and federal officials for their illegal use of the evidence have been abandoned by the appellant.

The trial court dismissed the removed state criminal contempt proceedings and initially granted a preliminary



injunction against the use by the federal officials of the illegally obtained evidence. However, when the case came on for final hearing, the trial court dismissed the other two complaints as well, primarily on the authority of Brittingham v. C.I.R., 451 F.2d 315 (5th Cir. 1971). The trial court noted that the question whether the evidence obtained from the illegal search by the state officers could be used in the civil tax proceeding which had been instituted on behalf of the federal agents upon having received access to the documents taken from Suarez's office could be determined in the Tax Court upon proper motion being made by the taxpayer.

The trial court dismissed the claim for damages against the state officials on the ground that any action against them was barred by the three-year statute of limitations. The court also found that there was no personal liability on the part of the federal officers, because, unlike the case in Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) there was no unconstitutional activity undertaken by the agents themselves, but rather they were operating solely within their official capacity. The court held further that the Federal Tort Claims Act did not waive sovereign immunity because it expressly provides that its waiver of immunity was not applicable to claims arising out of the assessment or collection of a tax.

As contemplated by the district court, the Tax Court, upon motion duly made by the taxpayer, held in a well-considered opinion that the evidence obtained by virtue of the illegal raid could not be utilized in the civil tax case against Suarez. It held that the concession by the Commissioner that his determination of some $700,000 of tax deficiency was based solely upon the illegally seized rec-

ords destroyed the presumption of correctness of the determination. A decision was therefore entered in favor of the taxpayer. Suarez v. Commissioner, 58 T.C. No. 78 (Filed Aug. 10, 1972). Although notice of appeal was filed by the Commissioner in the tax case, the appeal was subsequently dismissed by stipulation. Thus, Dr. Suarez's original complaint, which had as its purpose the prevention of the use by the IRS agents of the illegally obtained evidence in a tax case against him, was mooted. There is therefore nothing left on the merits of the original three complaints which were dismissed by the trial court, and which are on appeal here now.

However, Dr. Suarez contends that the effort and delay and concern which he suffered before finally prevailing on the principal issue warrants his recovering an attorney's fee against the federal officials. He claimed against the state officials as well, but it is clear that any claim against them, even if otherwise permissible, cf., Named Individual Members San Antonio Conservation Society v. Texas Highway Dept., 496 F.2d 1017, 1026 (5th Cir. 1974) would be barred by the statute of limitations.

We can find no basis on which attorney's fees could be allowed in this kind of action against the federal officials. In fact, as pointed out in the San Antonio case just cited we noted that the parties there conceded that the federal defendants are immunized from an award of attorney's fees by provisions of 28 U.S.C. § 2412.[1]

[1]This section provides as follows:

§ 2412. Costs.

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and 2517 of this title for the payment of judgments against the United States. As amended July 18, 1966, Pub.L. 89-507, § 1, 89 Stat. 308.



As we have stated, the injunction issue has been mooted by the action of the Tax Court, taken following the decision of the district court in these cases. In such circumstances there is nothing left to be tried. The appeal must therefore be dismissed.

## APPENDIX B

[TITLE OMITTED]

## PETITION FOR RE-HEARING

Plaintiffs-Appellants, EFRAIN T. SUAREZ, and ZENAIDA SUAREZ, respectfully petition this Court, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, for a re-hearing, upon the grounds that this Court, in affirming, overlooked or misapprehended the following:

1. This Court, in affirming a dismissal of Plaintiffs' Amended Complaint, as a matter of law, as against federal officials, did so exclusively basing the panel's Opinion upon a so-called Immunity Statute, 28 U.S.C. § 2412. That statute, however, has two qualifications, here material, which the Court, in its Opinion, has failed to consider or discuss.

2. The first provision, pertinent to the so-called Immunity Statute, is the exception provided in the first sentence thereof. The prohibition against the award of fees is applicable "except as provided by statute."

3. There is, here, a specific statute involved to-wit, 42 U.S.C. § 1983. In the Amended Complaint, copy appended, Plaintiffs charge the federal officials with acting in concert with state officials to violate Plaintiffs' civil rights under the Civil Rights Act. Thus, reading the attached Amended Complaint in a light most favorable to the Plaintiffs-Appellants, it cannot be said, as a matter of law, that the Amended Complaint fails to come within the exception, to-wit, a viable claim for relief, against both federal and state officials, for violation of 42 U.S.C. § 1983.

4. A second, more important exception, lies in the Immunity Statute itself. This, too, the panel has overlooked and failed to discuss in its Opinion.

The immunity provisions of 28 U.S.C. § 2412 are stated in that statute to be applicable only to an agency or official "acting in his official capacity."

5. Plaintiffs-Appellants respectfully submit to the Court that the case law and statutory history here applicable provide accepted judicial meaning to the clause of "acting in an official capacity." Excluded therefrom, is any official who acts unconstitutionally.

6. Stated another way, whenever a federal official acts unconstitutionally, he is stripped of his official capacity and treated just as any mere law breaker. This is the essence of a whole host of cases, especially those in-



volving civil rights violations, wherein judgments for damages have been rendered against federal officials who have acted unconstitutionally.

7. This is, in essence, the basis for the statement in Bivens v. Six Unknown Agents, 403 U.S. 338, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971), wherein it is specifically held that federal officials are answerable in damages, for complicity in unconstitutional invasion of premises without warrant, as here.

That the foregoing reasoning is sound, is confirmed by a review of the very case which is relied upon in the opinion, as supposed support for affirmance in respect to federal officials. The San Antonio case, 496 F.2d at 1025-1026, deals with Plaintiffs suing to implement a public program. So, too, does the Edelman case, upon which this Court relies at page 1026 of its San Antonio Opinion.

8. The San Antonio case itself, further goes on to point out,

> "Plaintiffs do not contend that their efforts in this environmental case have been made inordinately difficult by actions of defendants taken in bad faith or for oppressive reasons. There is, accordingly, no indication of unreasonable or obdurate obstinacy or vexatious or groundless conduct."

9. The SUAREZ', by contrast, complain specifically and at length that the federal officials, as well as the state officials are, in this case, guilty of unreasonableness; ob-

durateness; obstinacy and vexation. They also suggest that, in light of the long history of the Silver Platter Doctrine, the federal officials' insistence, after DR. SUAREZ prevailed in habeas corpus, upon relitigating the very same issue de novo, without any justifiable basis in evidence to expect a different result, was "groundless conduct." There is extreme "obstinacy."

10. If one re-reads the SUAREZ' Amended Complaint appended hereto, all five San Antonio exceptions appear. There is, here "unreasonableness;" "obdurateness;" "vexatious conduct" and "groundless conduct."

11. Thus, when one goes to the case relied upon in the instant Opinion, San Antonio itself establishes that a viable claim for relief is here stated.

12. The Court has also made short shrift of Plaintiffs-Appellants' arguments as to why limitations should not here be held applicable as against state officials.

This Court has not said that state officials are immunized in respect to a claim by the SUAREZ'. If they are not immunized then they are arguably, potentially liable therefor.

13. The damages here being sought are damages which were being sustained up to and including the moment when DR. SUAREZ prevailed in federal habeas corpus. Those damages were ongoing.

While the bullet may have been fired some years earlier, the shot would not come to rest until after DR.



SUAREZ prevailed in federal habeas corpus; secured an order that it was too late to reprosecute him without the tainted evidence and then secured an order for the return of these illegally seized items to his counsel.

14. Plaintiffs-Appellants respectfully submit, accordingly, that in respect to their damage claim against state officials, that they were here suffering ongoing damages, by way of a continuing constitutional tort. As to the attorneys fees portion of their claim it should be held that limitations did not begin to run until after they had been vindicated as to the unconstitutional state court proceeding and had full restitution under the state criminal restitutionary provisions.

15. If the SUAREZ' were seeking to recover for physical damages to the clinic premises or to the person of DR. SUAREZ, for "roughing up" on the date of his arrest, it is quite clear that as to these claims he would be limitations-bound as to the raiding officers.

What DR. SUAREZ is stating, however, is that there were continuing consequential damages suffered and that limitation did not begin to run as to these until the constitutional imposition was corrected and restitution made as to the illegally seized items.

16. Plaintiffs-Appellants further point out that they are only here seeking to have the Amended Complaint sustained, as stating a claim for relief. Both state officials and federal officials may well have individual immunity arguments which could be legitimately raised as defenses.

17. Plaintiffs-Appellants submit, however, that there are no absolute immunities, here applicable, as a matter of law. The various cases cited in Appellants' 1975 Memorandum reflected a multitude of viable claims, being sustained, for illegal search and seizure by state and federal officials. These are certainly not matters which should be disposed of as a matter of law by premature dismissal of the Amended Complaint.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Re-Hearing, was served upon GILBERT E. ANDREWS, ESQUIRE, Chief Appellate Section, U.S. Department of Justice, Washington, D.C. 20530; GAIL FELS, ESQUIRE, Fels and Fels, 1320 South Dixie Highway, Coral Gables, Florida; STUART SIMONS, County Attorney, Dade County Courthouse, Miami, Florida; and JOHN F. ELOYD, City Attorney, 65 S.W. First Street, Miami, Florida, this 15th day of April, 1975.

NORIEGA AND BARTEL, P.A.
Attorneys for Plaintiffs-Appellants
2100 First Federal Building
One S.E. Third Avenue
Miami, Florida 33131

By: /s/ Stanley Jay Bartel
STANLEY JAY BARTEL



## APPENDIX C

[TITLE OMITTED]

[Filed Apr. 30, 1975]

## ON PETITION FOR REHEARING

(April 30, 1975)

Before TUTTLE, COLEMAN and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

No. 72-1034

EFRAIN T. SUAREZ,
joined by his wife,
ZENAIDA SUAREZ,

Plaintiffs,

v.

LOUIE L. WAINWRIGHT,
Director of Division of Corrections,
State of Florida, et al.,

Defendants.

### AMENDED COMPLAINT

Plaintiffs bring this Amended Complaint, seeking injunctive relief and damages, and say:

### COUNT I

(TO ENJOIN FEDERAL USE OF
TAINTED EVIDENCE)

1. This Count arises under the United States Constitution and, in particular, the provisions of the First, Fourth and Fifth Amendments to the United States Constitution, the Fourteenth Amendment to the United States



Constitution and under the laws of the United States, more particularly, Title 28 U.S. Code, Sections 1331, 1340, 1343, 1346 and 1357.

2. The Defendants on this Count are the UNITED STATES OF AMERICA and all of its agencies or employees, or employees or agents of any of the said agencies, including but not limited to, RANDOLPH W. THROWER, Commissioner of Internal Revenue; JOHN N. MITCHELL, Attorney General of the United States; ANDREW J. O'DONNELL, JR., District Director of Internal Revenue; HENRY C. STOCKELL, JR., Regional Counsel, Internal Revenue Service; LOUIS M. TIGH, Chief, Appellate Division, Internal Revenue Service; DICK ELLIOTT, Chief of Intelligence Division, Internal Revenue Service; GLENN GILSON, Trial Attorney, Office of the Assistant Regional Counsel of Internal Revenue Service; HOMER C. CLINE, Special Agent, Intelligence Division, Internal Revenue Service; ROGER T. CABLE, Revenue Officer, Internal Revenue Service, and each of the said named individuals' successors and subordinates (sometimes hereafter referred to collectively as "the Federal Defendants").

3. Plaintiffs, while living in the Southern District of Florida, filed with the District Director of Internal Revenue, Jacksonville, Florida, U.S. Income Tax Returns for the years 1963 and 1964.

4. On or about January 3, 1964, agents of the State Attorney's office in and for Dade County, Florida and the City of Miami Police Department, conducted a raid upon premises, wherein Plaintiff was located, at 574 S.W. First Street, Miami, Dade County, Florida.

5. It has been held, as between the State of Florida and EFRAIN T. SUAREZ, that Plaintiff, EFRAIN T. SUAREZ, was subjected to an illegal entry, search and seizure, on the said premises.

6. This was determined in a proceeding which intially began in the Criminal Court of Record in and for Dade County, Florida, Case Nos. 64-457, 64-3116 and/or 64-3417. The ultimate adjudication of illegality was made by this Court, in federal habeas corpus proceedings, Case No. 69-145-Civ-WM.

7. The results of the said habeas corpus case have become final.

8. In the State Court action above described, the Criminal Court of Record Judge had entered an Order dismissing the state criminal charges against Plaintiff, EFRAIN T. SUAREZ.

9. On May 22, 1970, the Criminal Court of Record Judge, in the said action, ordered and directed that all illegally seized evidence, including copies of same, be returned to the within Plaintiff. His Order included not only those who intially seized the subject evidence, but those in privity with them, including transferees.

10. The Federal Defendants are transferees of originals and/or copies of evidence seized in this raid which has been held, as aforedescribed, to have been illegal vis a vis Plaintiff, EFRAIN T. SUAREZ.

11. The Federal Defendants, and in particular the Tax Officials and agencies, have asserted a deficiency



against the within Plaintiffs, for the years 1963 and 1964, which is directly predicated, by the admission of the Defendant Tax Officials, upon the evidence illegally seized in the aforementioned raid of January 3, 1964.

12. The Defendant Tax Officials have admitted, clearly and unequivocally, in the Tax Court of the United States (Stipulation of Facts) that:

> "14. The Internal Revenue Service came into possession of a photocopy of petitioner's daily records or appointment sheets, which were seized in the aforementioned raid on January 3, 1964. These daily records together with leads derived therefrom are the sole basis for respondent's determination herein, including the statutory notice of deficiency." (Emphasis supplied)

13. Plaintiffs assert that, as a matter of law, they are entitled to enjoin any transferee from the use, directly or indirectly, of any evidence held as between the State of Florida and the Plaintiff, EFRAIN T. SUAREZ, to have been the product of an illegal search and seizure, based upon the final determination thereof, heretofore described.

14. Plaintiffs further assert that under established State procedure, ancillary to the final disposition of the State Court criminal case aforedescribed, the State Court was authorized to and did properly determine that Plaintiff, EFRAIN T. SUAREZ, was entitled to the return of the original and all copies of documents seized in the raid aforedescribed.

15. The Federal Defendants, being admitted transferees of such tainted documents, are thus required, as a matter of law, to abide by the State Criminal Court determination and to turn over the said documentation to the Plaintiff.

16. The Federal Defendants, and in particular the Federal Tax Officials, procured their initial copies of the tainted evidence aforedescribed almost immediately following the raid of January 3, 1964.

17. Initially, the said Defendants asserted a fraud penalty, in addition to a deficiency for principal and interest but ultimately, in order to take further improper advantage of the illegal evidence aforedescribed, it was determined to eliminate such a fraud penalty, in that it would have placed a burden of proof, before the Tax Court of the United States, upon the Defendant, Commissioner of Internal Revenue. Instead, the deficiency was amended to seek negligence penalties only, with the result that, under established Tax Court procedure, the burden of disproving the deficiency falls upon the within Plaintiffs.

18. For Governmental Officials, even in pursuit of such an honorable end as the collection of taxes, to obtain evidence held to have been illegally seized, by another Government agency, and to thereafter seek to utilize it as a predicate for thrusting the burden of disproof upon the within Plaintiffs, who include the party aggrieved by the subject raid, is to violate the Constitutional rights of the within Plaintiffs, more particularly those of the Plaintiff, EFRAIN T. SUAREZ.



19. The determination of illegality, as between the transferor and Plaintiff, EFRAIN T. SUAREZ, became final before the commencement of any Tax Court trial.

20. Once that determination became final and the Plaintiffs being entitled to their requested relief herein, as a matter of law, Plaintiffs respectfully submit their entitlement to the immediate relief herein requested, notwithstanding any rights that they might have before the Tax Court.

21. The Tax Court is not, traditionally, suited to a vindication of the constitutional rights of citizenry, particularly those which derive from a criminal context.

22. More critical, however, in establishing Plaintiffs' entitlement to immediate relief from this Court, is the fact that as between the transferor of the subject evidence and the Plaintiff, EFRAIN T. SUAREZ, the matter of illegality has been finally determined.

23. The transferee has no better standing than that of the transferor, to retain the tainted evidence and Plaintiffs' being entitled, as a matter of law, to prohibit use of the said tainted evidence by a transferee who is another governmental agency, there is, in law, no requirement that would compel Plaintiffs to wait any longer for a full vindication of their rights in respect to the invasion of privacy heretofore determined.

24. This complaint does not seek to enjoin any Tax Court proceedings. It seeks only to enjoin transferees of certain tainted documentary evidence from using the same or any leads derived therefrom.

25. Under traditional doctrines of privity, the Federal Defendants are bound by the results of the prior determination in the case which originated in the State Criminal Court, as between the State of Florida and EFRAIN T. SUAREZ.

26. The Federal Defendants, accordingly, have no right to re-litigate the question as to the validity of the entry, search or seizure of January 3, 1964 but, rather, they are bound by it, as parties in privy with those transferors whose rights have been finally adjudicated, as aforedescribed.

27. Plaintiffs have no adequate remedy, in the Tax Court, if, under the circumstances of this case, they are to be required to demonstrate such.

28. The Tax Court does not acknowledge that, in civil matters, Internal Revenue Agents are bound by criminal court determinations as to illegality in the procurement of evidence.

29. In that Plaintiffs' rights cannot be quickly and adequately vindicated, in the Tax Court, they are thus without an adequate remedy elsewhere.

30. They are further without an adequate remedy, in the Tax Court, if, again, they must demonstrate such, in that if it should be determined, in pre-trial hearings, that immediate relief, in full, is not to be granted to Plaintiffs, there are no interlocutory appellate proceedings, from any such Tax Court ruling. According, with the absence of interlocutory appellate remedies and the burden of proof, upon Plaintiffs, under Tax Court procedural rules, it would



thereafter be necessary for the Plaintiffs to take the stand and disprove the deficiency asserted which, notwithstanding that Plaintiffs reported some $247,000.00 in gross income for the two said years, has been asserted at the astronomical level of more than $750,000.00.

31. Plaintiff, EFRAIN T. SUAREZ, would be further prejudiced, by having to take the stand in the said civil case, in order to avoid what would otherwise be an automatic deficiency assessment against him and his wife, in that he is, by profession, a doctor.

32. The activities, which are the alleged subject of the deficiency asserted, have to do with an allegation that illegal abortion activities were being conducted on the premises at 574 S.W. First Street, Miami, Florida, which is the scene of the same premises which was raided.

33. If, in order to vindicate himself in the Tax Court case aforedescribed, the Plaintiff, EFRAIN T. SUAREZ, were to be required to take the stand and testify, he might incriminate himself with respect to his professional activities.

34. Plaintiff, who by definition, has been subjected to an illegal search and seizure and who, in law, is entitled to enjoy the benefits of the exclusionary rule vis a vis all governmental agencies, initial or transferee, ought not be required to undergo the improper choice between remaining silent and suffering an automatic tax deficiency of astronomical proportions which Plaintiffs represent to this Court they are unable to either pay or supersede on appeal, or if Plaintiff, EFRAIN T. SUAREZ, should take

the stand in the said civil tax case, suffer the adverse consequences of destroying his means of livelihood, via loss of license and rights of practice in this or any other jurisdiction.

35. This is a clear case involving threatened conduct by Federal Officials, not State Officials.

36. The abstention doctrine, therefore, which has recently come to the fore, with respect to enjoining matters pending in State Courts, thus has no relevance.

37. Plaintiffs here ask this Court to vindicate their established constitutional rights by enforcing them as against Federal Officials.

38. Once a threatened violation of Federal standards as to search and seizure is demonstrated, as here, this Court, to insure that those standards are maintained and effectuated, is duty-bound to grant relief and to immediately enjoin those Federal Officials from persisting in the use of evidence which, by Federal standards, is tainted. Navarro v. United States, 429 F.2d 928 (5th Cir. 1970).

WHEREFORE, upon Count I hereof, Plaintiffs pray for the full amplitude of equitable relief, including an injunction, temporary and permanent, and for such other and further relief as may be meet and proper.



## COUNT II

## TO RECOVER DAMAGES AGAINST FEDERAL OFFICIALS FOR USE OF TAINTED EVIDENCE

39. Plaintiffs reallege and incorporate herein by reference, the entirety of Count I, excluding the prayer for relief.

40. The Defendants in this Count are those various officials, including their successors and subordinates, sued in Count I. The UNITED STATES, however, is not included as a party Defendant in this Count.

41. Plaintiffs assert that the use and reliance by the Federal Official Defendants, of the tainted evidence abovedescribed, constitutes a violation of the constitutional rights of the Plaintiffs to be free of civil tax prosecution emanating from the use of illegally seized evidence.

42. Plaintiffs assert that the use of the subject evidence and copies, by the Defendant Federal Officials, between the raid of January 3, 1964 and the results of the habeas corpus case abovedescribed, announced in August, 1969, was made with full knowledge that the constitutionality of the entry, search and seizure were under continuing court attack.

43. By reason of this knowledge, the Defendant Federal Officials acted at their peril in pursuing their tax investigation and civil tax case.

44. Certainly, at least, since the issuance of the habeas corpus Order of August, 1969, the Defendant Fed-

eral Officials have been knowingly acting in violation of Plaintiffs' constitutional rights, in seeking to predicate a civil tax case exclusively upon tainted evidence.

45. Finally, since May 22, 1970, the Defendant Federal Officials have knowingly violated the constitutional rights of the within Plaintiffs in refusing, notwithstanding State Court Order directed specifically at them, as transferees, to return all copies of tainted evidence.

46. Plaintiffs assert that they are entitled to damages, from the Federal Officials or such of them as actually participated, in whole or in part, in the use of the tainted evidence for civil tax prosecution.

47. Plaintiffs assert their entitlement to damages:

(a) Under the constitutional tort rule recently affirmed in the Bivens case;

(b) Under the common law of the State of Florida; and

(c) Under Title 42, United States Code, Sections 1983, 1985(2) and 1985(3).

48. With respect to their claims under the cited provisions of the Civil Rights Act, Plaintiffs assert that, notwithstanding that the Defendant Federal Officials are proceeding to seek to collect taxes under Federal statute, they have obtained and continued to hold their copies of the tainted evidence under color of State statute.



49. With respect to their claim asserted under Section 1985(2), Plaintiffs assert that two or more of the individual Federal Official Defendants did conspire, in the State of Florida, for the purpose of impeding, hindering, obstructing and defeating the due course of justice in the State of Florida, with intent to deny to the Plaintiffs the equal protection of the laws and to injure and deprive them of their rights to equal protection of the laws. Plaintiffs are entitled to the due course of justice reflected in the State Criminal Court dismissal and turnover Order and to equal protection of the laws, in respect to a decision of a court of competent jurisdiction, of the State of Florida, determining that Plaintiff, EFRAIN T. SUAREZ, had been subjected to an illegal search and seizure and directing the return to him as relief ancillary thereto, of the originals and all copies of evidence seized.

50. With respect to their claim under Section 1985(3), Plaintiffs assert that two or more of the individual Federal Official Defendants did go upon the highway, in the State of Florida and County of Dade, for the purpose of depriving Plaintiffs of equal protection of the laws and of their privileges and immunities under the laws and for the purpose of preventing Plaintiffs and hindering the constituted authorities of the State of Florida, giving and securing to Plaintiff, EFRAIN T. SUAREZ, within the State of Florida, the equal protection of the laws and that of the enforcement of the Orders of the Criminal Court of Record. Plaintiffs also assert that these same Federal Official Defendants, or other of that class, did engage in the State of Florida, or cause to be done, in the State of Florida, acts in furtherance of the object of the said conspiracy whereby Plaintiffs have been injured in their person and property.

51. Plaintiffs seek, as damages, their attorneys' fees in various court proceedings, both here and before the Tax Court, together with their attorneys' fees in resisting the deficiency assessment out of court. Plaintiffs further seek, as part of these damages, various costs and disbursements that they have been forced to incur, including not only the usual costs, billed by their attorneys, but such items as travel to and from court and other litigation oriented expenses directly advanced by them in reference to the tax deficiency here in issue.

52. Plaintiffs' damages exceed the sum of $10,000.00 on this Count.

WHEREFORE, Plaintiffs pray for damages against the Defendants in this Count, in excess of $10,000.00 and for their costs.

COUNT III

(FOR DAMAGES AGAINST COUNTY AND MUNICIPAL RAIDING OFFICERS)

53. Plaintiffs reallege and incorporate herein by reference the entirety of Counts I and II, excluding those matters specifically related to their Civil Rights Acts claims therein and to their prayer for relief therein.

54. The Defendants on this Count are RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit in and for Dade County, and those of his Assistants or investigators who actually participated, in any manner, in the raid of January 3, 1964, together with BERNARD L. GARMIRE, Chief of Police of the City of Miami,



State of Florida, and those of his assistants or investigators who actually participated, in any manner, in the said raid of January 3, 1964, together with such, if any, successor in office as may have or hereafter suceed the said RICHARD E. GERSTEIN or BERNARD L. GARMIRE.

55. The Defendants, in this Count, are, respectively, the State Attorney and the Chief of Police who are, respectively, the pertinent County and City department heads. The other Defendants in this Count, County and State, are the actual raiding officers.

56. Finally, in this Count, Plaintiffs seek damage judgments against the County of Dade and City of Miami, respectively.

57. With respect to this Count, Plaintiffs seek, initially, to recover compensatory damages from those County and Municipal Officials, abovedescribed, who actually participated in the raid of January 3, 1964.

58. Plaintiffs seek relief in this Count, in that the conduct of the said raiding officials constituted a violation of Plaintiffs' constitutional rights as reflected in the Bivens rule; their rights to be free of unlawful invasion of premises or of their privacy, under State law; and their rights under the previously cited provisions of the Civil Rights Act.

59. With respect to the Civil Rights Act, the color or law involved in this Count was the purported authority of State law to make a raid upon the premises at 574 S.W. First Street, Miami, Dade County, Florida, on January 3, 1964. The use of the highways; violation of due process,

equal protection and the other rights required to be asserted in connection with Sections 1985(2) and 1985(3) are all obvious. The raid in question represented a combined activity between County and City officials, with extensive pre-planning, whereby, without warrant, they broke and entered into premises in which Plaintiff was thereupon arrested, following which these said County and Municipal Officials conducted a general, exploratory search, without obtaining warrant, into areas beyond the area in which Plaintiff, EFRAIN T. SUAREZ was arrested and otherwise violated the constitutional rights of the Plaintiff, EFRAIN T. SUAREZ, to be free of an illegal search and seizure.

60. The department head Defendants, in this Count, are sued on the theory that they, as responsible superiors to the raiding officers, failed to properly train and/or instruct their subordinates as to the manner of conducting a lawful raid of premises.

61. The County and City Defendants on this Count are added in view of the apparent undermining of certain ancient doctrines of immunity. It would now appear that both the County and City, as the employers of the respective raiding officers, are equally liable for the torts, constitutional and otherwise, and that, if judgments be available herein against any individual raiding officers, his respective employer should likewise be found liable.

62. Plaintiffs assert that none of the Defendants in this Count has any defense, with respect to the issue of liability.



63. Plaintiffs assert that the determination of an illegal raid, hereinabove referred to, is final and binding upon all those officers who participated in the raid or who are responsible therefor.

64. Plaintiffs assert, therefore, their entitlement to a judgment, as a matter of law, with respect to liability on this Count, saving unto the Defendants on this Count the right to defend as to damages.

WHEREFORE, Plaintiffs pray for damages in excess of $10,000.00, upon this Count, and for their costs.

## COUNT IV

(FOR DAMAGES AGAINST
STATE AND MUNICIPAL DEFENDANTS
FOR FALSE IMPRISONMENT)

65. Plaintiffs reallege and incorporate herein by reference the entirety of the foregoing Counts, excluding only those matters which have specific reference to the underlying bases for liability or to the prayers for damages.

66. Prior to the determination by this Court, in the habeas corpus action, Plaintiff, EFRAIN T. SUAREZ, notwithstanding his constitutional protests, was convicted and jailed for the crime for which he was arrested in the subject raid of January 3, 1964.

67. Plaintiff, EFRAIN T. SUAREZ, asserts that under new doctrine, with respect to compensating injured parties for invasion of their constitutional rights, Plaintiff, EFRAIN T. SUAREZ, is entitled to recover under

Bivens; under State law and under the cited provisions of the Civil Rights Act for his false imprisonment, commencing with his arrest and detention and to and including all detentions, for the subject charges, until his release from prison in 1969.

WHEREFORE, Plaintiffs pray for damages in excess of $10,000.00, upon this Count, and for costs.

## COUNT V

## (FOR DAMAGES AGAINST STATE OFFICIALS FOR FAILURE TO PROVIDE SAFE PRISON FACILITIES)

68. Plaintiffs reallege and incorporate herein by reference the entirety of the foregoing Counts, excluding only those matters which have specific reference to the underlying bases for liability or to the prayers for damages.

69. The Defendants on this Count are the STATE OF FLORIDA, Louie L. Wainwright, Director of Division of Corrections, State of Florida, DeWITT SINCLAIR, Superintendent of Raiford Prison, State of Florida, and their respective successors and subordinates.

70. While a prisoner at Raiford, Florida, serving sentence for the conviction which was set aside by virtue of the habeas corpus determination aforedescribed, Plaintiff, EFRAIN T. SUAREZ, was a ward of the Defendants on this Count, in that he was a State prisoner.

71. Among the duties imposed upon the Defendants, as the said Plaintiff's jailers, was and is the duty to pro-



vide Plaintiff with safe prison facilities, particularly facilities safe from savage assaults by gangs of prisoners.

72. Plaintiff asserts, based upon information and belief, that the Defendants on this Count, well prior to the beating which is the subject of this Count, well knew of gang-type forays on the prison premises at Raiford, Florida, but knowingly, negligently and improperly refused to take proper steps to bring a halt to these incidents; that their conduct, in view of the frequency and gravity of physical attacks upon prisoners, known to them, was in reckless disregard of the safety of Plaintiff and other prisoners.

73. While a prisoner, Plaintiff was savagely beaten, about the head, by a gang of fellow prisoners.

74. The failure of the Defendants on this Count to prevent the said beating, was a violation of Plaintiff, EFRAIN T. SUAREZ's rights, under the Constitution as reflected in the Bivens rule, under State law and under the Civil Rights Act, Sections previously cited.

WHEREFORE, Plaintiffs pray for compensatory damages, in excess of $10,000.00, and for the costs of this Count.

## IDENTIFICATION OF PARTICIPATING FEDERAL, STATE, COUNTY AND MUNICIPAL OFFICIALS

75. Plaintiffs are unable to detail, with precise accuracy, the names of each and every Federal, State, Coun-

ty or Municipal Official who should be properly joined as an individual party Defendant in this action.

76. Plaintiffs do know the names Michael Daugherty, Barbara Williams, Myrtle Ellison, Glen L. Baron, Malcolm Gracey and Jack Elmore, as having been participants, on behalf of the County and Municipality, in the raid on the premises. Plaintiffs believe that one or more of the named women has changed her name since the initial complaint herein and have been advised that Glen L. Baron is deceased.

77. With respect to tax officials joined in this action, Plaintiffs have named those individuals who are either the pertinent department heads and obviously passed upon or authorized the pursuit of the tax case in issue, together with the name of one or two individuals who are known, from conferences with Plaintiffs' tax counsel, to have participated, in some manner, in the course of the Tax Court case.

78. Plaintiffs require the assistance of discovery in order to be able to precisely identify those Defendants who are asserted to be individually responsible to Plaintiffs, for damages, on the Counts other than Count I.

79. Plaintiffs desire to reserve the right to add these individual Defendants, within the previously designated classes, as their identities are made known during the course of discovery in this action.

80. Plaintiffs also seek to reserve the right, to the extent that it may be necessary or appropriate, to affect



substitution of parties where there have been changes, marriages, deaths and the like, during the course of the pendency of this action.

PAUL, LANDY, BEILEY
& BARTEL
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377-0201

By /s/ Stanley Jay Bartel
Stanley Jay Bartel

## APPENDIX E

[TITLE OMITTED]

[October 22, 1971]

### ORDER DISMISSING COUNTS I, II, III AND IV OF AMENDED COMPLAINT

The plaintiffs, by an amended complaint in this action, seek relief by way of injunction and damages in five separate counts, and have named as defendants the United States of America, various officials of the Federal Government, all of whom are collectively referred to as the Federal Officials; the State of Florida; the County of Dade; and the City of Miami; and various officials of the State of Florida, the County of Dade and the City of Mi-

ami.[1] Counts I and II of the complaint are directed at the United States and the designated Federal Officials, and seek to enjoin the Federal Government from using evidence allegedly illegally seized. It is clear from the allegations what the plaintiffs basically seek to do is to enjoin the Federal Government from proceeding with a pending Tax Court case instituted by the plaintiff, Efrain T. Suarez, as well as seeking to enjoin the Government from proceeding with any further civil or criminal proceedings against either of the plaintiffs on the basis of the evidence derived directly or indirectly from the allegedly illegal raid on January 3, 1964. Count II of the complaint is directed only at the Federal Officials and seeks relief by way of damages occasioned by the use of the allegedly illegally seized evidence by the Federal Officials. Count III seeks damages from the County of Dade, City of Miami, and the various city and county officials occasioned by the allegedly illegal raid occurring on January 3, 1964. Count IV seeks damages against the various state and municipal defendants for false imprisonment. Count V seeks damages against the State of Florida and the various state officials for failing to provide safe prison facilities.

The facts as are set forth in the amended complaint are as follows: on January 3, 1964, agents of the State's Attorney's office for Dade County, Florida, and the Miami Police Department, conducted a raid of the premises at which the plaintiff, Efrain T. Suarez, hereafter referred to as the plaintiff, was conducting a clinic.

[1]Plaintiffs had originally commenced this action by a nine-count complaint seeking somewhat similar relief by way of injunction and damages which has been replaced and superseded by the amended complaint.



Immediately after the raid, the plaintiff was placed under arrest and charged with the crime of "attempted abortion." He was ultimately tried on this charge and convicted in the Criminal Court of Record in and for Dade County, Florida. At and prior to the trial of the plaintiff, he raised the defense by way of motions that the evidence being used against him, to wit, the material seized in the alleged illegal raid of January 3, 1964, should be suppressed and not used against him. The Trial Court failed to find any illegality in the raid and the resulting search and seizure and denied all such motions. Thereafter, an appeal was taken to the Florida District Court of Appeals, which affirmed the lower court's decision, and both the Florida Supreme Court and the United States Supreme Court declined to grant a writ of certiorari. The plaintiff then sought to obtain relief pursuant to postconviction proceedings under state law, but was unsuccessful.

Then, having exhausted all other remedies, he applied to this Court for a writ of habeas corpus, which was granted on August 6, 1969. This Court granted its writ of habeas corpus on the basis of 28 U.S.C., Section 2254 (d) (8), and found that the record of proceedings in the State Court did not fairly support the factual finding that an exigency existed which excused the police officers from announcing their identity and purpose, thereby making the resulting search and seizure legal. All of the foregoing are set out in greater detail in the opinion of this Court filed August 8, 1969.

While the above events were transpiring, the District Director of Internal Revenue on June 8, 1967, issued a statutory notice of deficiency claiming deficiencies in the income tax liabilities of both the plaintiffs for the calen-

dar years 1963 and 1964. Upon receipt of this statutory notice, the plaintiffs filed a petition with the Tax Court of the United States, seeking a redetermination of the deficiencies set forth therein.

Plaintiffs claim that the present action is one merely to enforce the previous orders of this Court and that this action is not barred by the provisions of 26 U.S.C. § 7421 (a), but rather is an adjunct to the order previously entered by this Court on August 8, 1969. However, the order of this Court on August 8, 1969 granting the writ of habeas corpus did not order suppression of the evidence or pass upon the question of whether the search which took place on January 3, 1964 was legal or illegal, but rather only considered whether or not the record in the State Court proceeding was sufficient to support the State Court's finding that the search was legal.[2] Thus, this Court has never directly passed upon the question of whether the raid conducted on January 3, 1964 was legal or illegal, and nothing in any orders of this Court should be construed as so holding.

The question of whether or not the raid of January 3, 1964 and the ensuing search and seizure was legally sufficient within the meaning of the Fourth Amendment of the Constitution is now under submission before the Tax Court of the United States, together with the question of whether any evidence that may have been obtained illegally may be used to make an assessment or used in that proceeding.

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[2]It should be noted that the orders of this Court of May 4, 1970 and May 5, 1970, and the order of May 22, 1970, of Judge Carling Stedman of the Criminal Court of Record in and for Dade County, Florida, were merely entered to reflect that the State had elected not to retry the plaintiff and that he should therefore be released and that the evidence seized could be returned.



## COUNT I

In Count I the plaintiffs seek to restrain the use by Federal Agents of evidence that was obtained in the alleged illegal raid of January 3, 1964. The record shows that such evidence is being used in a Tax Court proceeding. However, as was pointed out, there has not yet been an order of suppression with respect to that evidence. The relief sought against the United States and its Federal Agents in Count I as well as in Count II constitute a suit against the United States to which it has not consented and in accordance with the well-established principle of law of sovereign immunity this suit must be dismissed. Land v. Dollar, 370 U.S. 731; United States v. Shaw, 309 U.S. 495; Louisiana v. McAdo, 234 U.S. 627.

Moreover, this case is clearly controlled by the holding of the United States Court of Appeals for the Fifth Circuit in the recent case of Roberta M. Brittingham v. United States Commissioner of Internal Revenue, et al., No. 71-1281, decided October 4, 1971, ____ F.2d ____. In that case the plaintiff sought to prevent the Commissioner of Internal Revenue from introducing documents in certain cases pending before the Tax Court to prevent the Commissioner from using the documents for any other purpose and to order that the documents be returned to her. The District Court dismissed the case on the basis that the Court lacked the necessary jurisdiction and the complaint failed to state a claim upon which relief could be granted. The Court of Appeals for the Fifth Circuit affirmed the decision of the District Court dismissing the complaint for three reasons. First, it stated that the clearly expressed Congressional policy was that the Courts should not interfere in the tax collection process as is

evidenced by the directive contained in 26 U.S.C. Section 7421(a) and 28 U.S.C., Section 2201. In finding that the Court had no jurisdiction, the Fifth Circuit relied on the case of Koin v. Coyle, 402 F.2d 468 (7th Cir. 1968), a case whose facts are quite similar to the one now before this Court and in which the Court held that Section 7421 (a) prevented the Court from exercising its jurisdiction to grant the injunctive relief by way of passing upon which evidence could be used by the District Director in making the assessment.

The Fifth Circuit then went on in the Brittingham case, supra, to state that in addition to the lack of jurisdiction, that courts of coordinate jurisdiction should not review, enjoin or otherwise interfere with one another's jurisdiction, and that the Tax Court, within its limited jurisdiction, was of equal stature with the District Court.

The Fifth Circuit also held that there was no showing of the absence of an adequate legal remedy because the Tax Court had not yet made a final ruling on the admissibility of the disputed documents and because any decision of the Tax Court once rendered would be fully reviewable in the Court of Appeals.

I find, therefore, that the Brittingham case, supra, is fully controlling and that Count I of the complaint should be dismissed for lack of jurisdiction, and I further find that on the basis of comity this Court should not interefere with the exercise of jurisdiction by the Tax Court over this matter, and that the plaintiffs have an adequate legal remedy in the Tax Court with right of appeal therefrom to the United States Court of Appeals for the Fifth Circuit. Accordingly, Count I of the plaintiffs' complaint should be and hereby is dismissed.



## COUNT II

Count II of the amended complaint, which seeks relief by way of damages from the Federal Officials under Sections 1983, 1985(2) and 1985(3), Title 42 U.S.C. stems from the raid and search of the premises which took place on January 3, 1964. It is clear that if such actions are to be brought they must be timely instituted. The Civil Rights Act itself does not specify a period of limitation and therefore the state statute of limitations applies to Count II. Jackson v. Duke, 259 F.2d 3 (5th Cir. 1958); Shank v. Spruill, 406 F.2d 756 (5th Cir. 1969); Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967). Count II of the present action is governed by the three-year statute of limitations set forth in 95.11(5)(a) Florida Statutes. Nevels v. Wilson, 423 F.2d 691 (5th Cir. 1970) Since the raid in question was conducted in January of 1964, any cause of action concerning a deprivation of any rights arising out of that raid and search should have been instituted prior to January of 1967. Thus, since this action was first instituted in June of 1970, the cause of action set forth in Count II has not been timely brought and must be and therefore is dismissed. Even if this action were deemed to fall within the purview of the more liberal four-year limitation period under F.S. §95.11(4), it would likewise be barred.

Moreover, assuming, arguendo, that the action was timely brought, the action set forth in Count II is barred by the doctrine of sovereign immunity. It is clear that while the action is directed only at the Federal defendants, and not toward the United States, it is directed at the action of these Federal Officials in carrying out their official duties. In the case at bar, the Federal Officials

were clearly doing nothing more than what is required of them by Sections 7601, 7602 and 6212 of Title 26 U.S.C., that is, to conduct an investigation to determine the correctness of income tax returns filed by the plaintiffs and in the event they come to the conclusion that the returns are not correct, to determine the deficiency in the tax liability. It is clear that in the absence of express consent to an action such as this an action may not be maintained against the sovereign. The sovereign immunity with respect to the United States with respect to damages sounding in tort, which Count II of this action might now be construed to be, has been specifically waived by the provisions of the Federal Tort Claim Act, Section 2671, Title 28 U.S.C., et seq. This waiver of sovereign immunity is, however, subject to specific exceptions which limit the provisions of that action. One of the exceptions is contained in Section 2680(c), 28 U.S.C., which provides that the provisions of that chapter shall not apply to "any claim arising in respect of the assessment or collection of any tax * * *". In the case at hand, it is readily apparent that the only action taken by the United States, i.e., the conduct of a tax investigation, the determination of a deficiency, the mailing of a statutory notice of deficiency, and the defense of a petition for the redetermination of such deficiency instituted in the Tax Court by plaintiffs clearly all relate to the assessment of a tax. As such, this Court is specifically prohibited to exercise its jurisdiction by Section 2680(c) of Title 28 U.S.C.

Accordingly, I find that Count II is barred by the statute of limitations, and even if it were not barred by the statute of limitations, it is an unconsented suit against the Federal Officials, which is barred by the doctrine of sovereign immunity.



## COUNT III

Count III of the complaint is directed against Dade County, the City of Miami, and various officials of the County and City, including the State's Attorney, Chief of Police and their subordinates or assistants who participated in the January 3, 1964 raid. It is clear that any action for damages under the Civil Rights Statutes cannot lie against the City of Miami or Dade County for acts committed in performance of their governmental functions. Monroe v. Pape, 365 U.S. 167 (1961); Mayhue v. City of Plantation, 375 F.2d 447 (5th Cir, 1967); Mareno v. Henckle, 431 F.2d 1299 (5th Cir. 1970); Hill v. City of El Paso, 437 F.2d 352 (5th Cir. 1971). Therefore, the action against the City of Miami and Dade County must be and hereby is dismissed.

With respect to the individually named defendants under Count III, the action must also be dismissed. Count III is founded upon the Civil Rights Statutes and upon claims for deprivation of plaintiffs' constitutional rights based upon the Supreme Court's recognition of such a claim in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The actions of defendants for which damages are sought occurred on January 3, 1964, more than six years prior to the institution of the present action. It is well recognized that because no statute of limitations is specified in the Civil Rights Statutes (which are part of the basis for plaintiffs' claim here) the applicable state limitation periods should be adopted. Shank v. Spruill, 406 F.2d 756 (5th Cir. 1969); Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967). The Fifth Circuit has interpreted the Civil Rights Statutes as falling within the three-year limitation period under F.S.

§95.11(5)(a). Nevels v. Wilson, 423 F.2d 691 (5th Cir. 1970). Even if this action were deemed to fall within the purview of the more liberal four-year limitation period under F.S. §95.11(4), it would likewise be barred.

Plaintiffs' claims under Count III are, however, founded upon a Bivens claim aside from the Civil Rights Statutes. The Supreme Court when it recognized the existence of a claim founded upon a constitutional deprivation in Bivens did not reach the issue of limitation of that form of action. In the absence of any authority from either the Supreme Court, or the Fifth Circuit, this Court is of the opinion that the claim under Bivens should, by analogy to the Civil Rights Statutes, borrow the state statute of limitations applicable under Nevels v. Wilson, supra. Count III must also be barred under either the three- or four-year Florida Statute, F.S. §95.11, and is therefore dismissed.

## COUNT IV

The fourth count of the complaint seeks recovery for false imprisonment apparently from the various state and municipal defendants, although the defendants in this count are not designated with any degree of specificity. This claim is based upon Bivens, the Civil Rights Statutes, and state law.

Again, as in the other counts, supra, state law governs the determination of whether this action has been timely brought. F.S. §95.11(6) specifically provides a two-year period within which actions for false imprisonment must be brought. Plaintiffs' allegations cover the period from Suarez' arrest and detention on January 3, 1964, to and including his release from prison on or about August 6, 1969.



If the two-year period began to run on the former date, then this claim is barred. If, however, the claim can be deemed to have arisen on the latter date, the date of Suarez' release from incarceration, then this claim is not barred. It has not been determined under Florida law when a claim for false imprisonment arises. In Henig v. Odorioso, 256 F.Supp. 276 (E.D. Pa. 1966), aff'd 385 F.2d 491 (3rd Cir. 1967), cert. den. 390 U.S. 1016, (1968) reh. den. 391 U.S. 929 (1968), the plaintiff based a Civil Rights Statute action upon a claim for false arrest, false imprisonment, slander and malicious prosecution. Plaintiff therein was allegedly falsely arrested on March 22, 1962, incarcerated on July 13, 1962, and released on January 25, 1963; the action was filed on October 22, 1964. It was held that under a two-year statute of limitations the claim was barred because the limitations period begins to run on the date the imprisonment commenced. 385 F.2d at 493. A recent case in the Fifth Circuit, Knowles v. Carson, 419 F.2d 369 (5th Cir. 1969), an action alleging civil rights violations stemming from an arrest, held that there was no reason that the statute of limitations should be tolled because the plaintiff was incarcerated. Id. at 370.

This Court is of the opinion that if the Florida Courts were to pass upon the issue, a claim for false imprisonment would be held to arise upon the commencing of the incarceration, rather than upon the date of release. Thus the claim under Count IV is barred, as it was not brought within two years of January 3, 1964, and hence is dismissed.

## COUNT V

The fifth count of the complaint seeks recovery of damages from the State of Florida, State Prison officials and their subordinates for an assault by fellow prisoners which allegedly occurred while plaintiff was incarcerated at Raiford Prison. This claim is also founded upon the various sections of the Civil Rights Act, state law, and upon the Constitution as reflected in the Bivens case.

This Court finds that the two-year limitations period provided in F.S. §95.11(6) would be the proper basis upon which to test the claims under this Count. The original complaint in this action was filed on June 3, 1970. Plaintiff was released from Raiford Prison pursuant to this Court's order of August 6, 1969.

Because no date is specified in this complaint as the date of the occurrence of the alleged beating, this Court cannot at this time pass upon the timeliness of this count, except to hold than any claim based upon acts which occurred more than two years prior to the filing of the original complaint in this action must necessarily be barred under the Florida Statute of Limitations. Any claim based upon acts which occurred within the two-year period prior to June 3, 1970 would necessarily withstand dismissal based upon a claim of untimely filing.

DONE and ORDERED at Miami, Florida, this 22nd day of October, 1971.

/s/ W. O. Mehrtens

United States District Judge



## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

NO. 69-145-Civ-WM

EFRAIN T. SUAREZ,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Director, Division of Corrections,
State of Florida,

Respondent.

(Filed Aug. 8, 1969)

## ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

This is a petition for habeas corpus filed under 28 U.S.C. § 2254. Petitioner Efrain T. Suarez was convicted in the Criminal Court of Record in and for Dade County of attempted abortion and sentenced on March 15, 1965 to three and one-half years. The conviction was affirmed in Rodriguez v. State, 189 So.2d 656 (Fla. Dist. Ct. App. 1966). The Supreme Court of Florida denied certiorari at 196 So.2d 923 and the Supreme Court of the United States denied certiorari at 389 U.S. 848. The denial of petitioner's motion to vacate and set aside the conviction under 33 F.S.A. Rules of Criminal Procedure, Rule 1.850 was affirmed at 220 So.2d 442 (Fla. Dist. Ct. App. 1969). For the reasons stated below the writ is granted.

The conviction is attacked on the grounds that evidence introduced against the petitioner at his trial was illegally seized and therefore violated petitioner's rights under the Fourth Amendment as made applicable to the states through the Fourteenth Amendment. The facts surrounding the seizure of the evidence are as follows. In the fall of 1963 the City of Miami Police received information that the Ayala Clinic in Miami was being used for the performance of abortions. By December 1963 the police and the State Attorney's office, working together, had gathered witness affidavits and a complete lay-out of the interior of the premises of the Ayala Clinic. A plan was formed to raid the premises. The services of two Tampa policewomen were engaged. Barbara Williams, one of the policewomen, called the clinic by phone, pretending to need an abortion, and made an appointment for the morning of January 3, 1964. The plan called for Barbara Williams and Myrtle Ellison, the other Tampa policewoman, to be driven to the Ayala Clinic in a rented taxi cab by a police officer. Members of the police and the State Attorney's office were stationed outside. Pursuant to the plan, Miss Williams passed $1,000.00 in marked bills to petitioner Suarez and was then told to ready herself for the operation. At this point, Officer Ellison asked Dr. Suarez to excuse her. He walked her to the door and let her out, locking the door behind her as she left. She then told the waiting officers that the money had passed hands and that the doctor was going to give Miss Williams a shot. The officers thereupon knocked on the front door to the clinic and stated their identity — "Police officers. State Attorney's Office. Open the door." After waiting somewhere between fifteen and thirty seconds, knocking again and receiving no answer, the officers knocked down the door and forced their way into the clinic. At this time they placed the petitioner and



others under arrest for attempted abortion and seized the articles later admitted into evidence over petitioner's objection. It is undisputed that the officers announced only their identity without ever announcing their purpose in being at the Ayala Clinic until after their forced entry. Neither an arrest warrant nor a search warrant was ever obtained.

The petitioner attacked the entry of the officers and the subsequent search and seizure on three grounds:

1. The announcement of the raiding officers was constitutionally deficient because the officers announced only their authority but not their purpose.

2. The search was illegal because it was an exploratory search made without a warrant when there was ample time to procure one.

3. Even if the entry was legal and a search incidental to arrest permissible, the search was a broad and exploratory one exceeding such authority.

In view of the disposition of the first ground raised it is not necessary to consider the other two. The cause was submitted to this court on the briefs and oral arguments of counsel and a transcript of each of the state court proceedings. There was a question raised in the briefs and on oral argument as to whether petitioner had exhausted his state remedies on the third ground asserted relating to the exploratory search. I find that this ground was in fact presented to the state courts. See Suarez v. State, 220 So.2d 442, 444 (Col. B).

Preliminarily it is noted that if there ever was any doubt about the availability of federal habeas corpus to a state prisoner attacking the constitutionality of the seizure of evidence introduced against him at trial, that doubt has been effectively erased by the Supreme Court. Kaufman v. United States, ____ U.S. ____, 89 S.Ct. 1068, ____ L.Ed.2d ____ (1969).

Petitioner's primary contention is that the entry of the police and State Attorney officers was illegal because only half of the constitutionally required announcement of identity and purpose was made and that, therefore, the evidence seized should have been suppressed.

It is clear that an announcement of both identity and purpose is required before officers may break into premises whether they are armed with warrants or not. Sabbath v. United States, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968); Miller v. United States, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958); United States v. Gable, 276 F.Supp. 555 (E.D. Pa. 1967); United States v. Barrow, 212 F.Supp. 837 (E.D. Pa. 1962). It also seems clear that one exception to the requirement of an announcement exists where there is a reasonable belief on the part of the entering officers that an exigency exists whereby evidence will be destroyed or someone's safety imperiled. Ibid. After hearing testimony and argument on the motion to suppress, the trial judge in the state court found that there was ground for the policemen who were waiting outside to believe, as they had testified, that Policewoman Williams was in danger of some harm from a hypodermic needle or other instrument which would be used in an attempted operation on her. (R. 95) Accordingly, he found an exigency existed which excused the officers from making an announcement of their purpose.



While the question of what constitutes a valid arrest so as to support incidental search in a mixed question of law and fact. see, Diaz v. State, 181 So.2d 351 (Fla.Dist. Ct.App. 1965); Urso v. State, 134 So.2d 810 (Fla.Dist.Ct. App. 1961); and therefore is a question which must be reviewed anew by a federal district court in a habeas corpus proceeding without deference to the state court determination, see, Townsend v. Sain, 372 U.S. 293, 309 n. 6 (1963), the finding by the state courts in this case that there was a reasonable belief on the part of the police officers that Officer Williams was in peril is a finding of fact. See, United States v. Gable, supra. As such, it comes to this court with a presumption of correctness, 28 U.S.C. § 2254(d). It is evidenced in writing by the transcript of the motion to suppress and by the opinion of the Florida District Court of Appeals (189 So.2d 656) and none of the following appear:

> "(1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding," 28 U.S.C. § 2254(d).

Since none of these seven is in issue here the presumption of the correctness of the state court finding stands unless it is not fairly supported by the record, 28 U.S.C. § 2254 (d)(8). An examination of the state court record as a whole leads me to conclude that the state court's finding that there was a reasonable belief on the part of the raiding officers to excuse the complete announcement of both their identity and purpose is not fairly supported by the record.

There is testimony in the transcript of the motion to suppress in the state court that the officers were in a hurry to get inside the clinic to prevent harm to Officer Williams and that she was not, to their knowledge, armed. The officers had previous knowledge that the door to the clinic was held secure from the inside by a steel bar. The petitioner told Policewoman Williams in the presence of



Policewoman Ellison that he was going to give Williams a shot. Officer Ellison came out of the clinic and told the waiting officers that Officer Williams was about to get a needle. When the officers knocked and announced their identity and no one answered, Policewoman Ellison told them to hurry because petitioner was going to give Williams a shot.

The record also reveals that there were no sounds inside the clinic which would lead the officers to think any harm was coming to Policewoman Williams (R. 9). The officers testified that it was part of the plan that if anything went wrong and they could not get into the clinic Officer Williams would not let herself be aborted and would herself place petitioner and others in the building under arrest. Miss Williams was dressed at the time Policewoman Ellison left her to go outside to get the other officers. It is undisputed that the officers knocked and announced their identity and waited between fifteen and thirty seconds before knocking again and breaking down the door. The statement by Policewoman Ellison to the other officers to hurry because petitioner was going to give Williams a shot was made after the initial announcement of identity and immediately before the forcible entry; that is, it was made fifteen to thirty seconds after the initial announcement of identity. Thus, the state court record fairly supports the conclusion only that the officers reasonably believed at the time of the entry that there was an exigency excusing any further announcement. It does not, however, support the conclusion that there was such a belief from the time the officers began knocking on the door to the clinic. They had between fifteen and thirty seconds to complete the announcement by shouting their

purpose as well as their authority. I find the reasoning of United States v. Barrow, 212 F.Supp. 837 (E.D. Pa. 1962) inescapable:

> "[T]here was in fact an announcement of identity. Obviously, if the agents had a bona fide belief that announcement would result in peril, that peril would come from the fact and not the nature of an announcement. The fact that some announcement was made dispels any doubt that the agents had no bona fide apprehension of peril if an announcement were made." Id. at 847.

It was stipulated that only half of the constitutionally required announcement was made. I find that no exigency existed which excused the making of the other half of the announcement. The entry of the officers into the clinic was illegal and the motion to suppress the evidence obtained thereafter should have been granted.

ACCORDINGLY, it is ORDERED and ADJUDGED that the writ of habeas corpus be and the same hereby is GRANTED and that the judgment of conviction be vacated and a new trial granted to the petitioner within a reasonable time or the petitioner set free.

DONE and ORDERED at Miami, Florida, this 6th day of August, 1969.

W. O. MEHRTENS

United States District Court



**APPENDIX G**

**EXHIBIT "B"**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

NO. 69-145-Civ-WM

EFRAIN T. SUAREZ,

Petitioner,

v.

LOUIE L. WAINWRIGHT,
Director of Division of Correction, State of Florida,

Respondent.

**ORDER FIXING AND DETERMINING EXPIRATION OF RETRIAL TIME**

THIS CAUSE having come on before the Court, upon Petitioner's Motion for Order Determining Expiration of Retrial Time; this Court, by Order Granting Petition for Writ of Habeas Corpus filed August 8, 1969, having vacated the within Petitioner's State Court conviction in the Dade County Criminal Court of Record in Case No. 64-457, 64-3116 and/or 64-3417, with directions to retry the within Petitioner, without the use of certain unlawfully obtained evidence, within a reasonable time or Petitioner would be set free; well beyond six months from said Order having expired and to date there having been no retrial; the entry of the requested Order appearing just and proper,

in order to remove the cloud of apparent pendency of the subject charges against this Petitioner, and the Court being fully advised in the premises, it is thereupon

ORDERED and ADJUDGED that the reasonable period of time provided for in this Court's Order Granting Petition for Writ of Habeas Corpus of August 8, 1969, within which to retry this Petitioner for the subject charges heretofore pending in the Criminal Court of Record in and for Dade County, Florida, has expired.

DONE and ORDERED at Miami, Florida, this 5th day of May, 1970.

/s/ W. O. Mehrtens

Judge, United States District Court



## APPENDIX H

## EXHIBIT "D"

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

NO. 64-457 (Stedman)

STATE OF FLORIDA,

Plaintiff,

v.

EFRAIN T. SUAREZ,

Defendant.

## ORDER DIRECTING RETURN OF PROPERTY SEIZED

THIS CAUSE having come on before the Court upon Defendant's Motion for Return of Illegally Seized Property, the January, 1964 raid which was a predicate for this prosecution having been found to have been illegal in Federal habeas corpus proceedings; the requested relief being appropriately required under the Florida Statutes, case law and practice, and the Court being fully advised in the premises, it is thereupon

ORDERED and ADJUDGED that the State of Florida, its attorneys, investigators, agents, agencies, and representatives, and any parties in privity with any of them, be and they shall forthwith return to the within Defend-

ant, EFRAIN T. SUAREZ, through his counsel of record herein, Stanley Jay Bartel, Esquire, 341 Pan American Bank Building, Miami, Florida, all books, records, papers, documents and other items seized, and any and all copies of the same, excluding only photographs made during or after said raid.

DONE and ORDERED at Miami, Florida, this 22nd day of May, 1970.

CARLING STEDMAN

Judge, Criminal Court of Record

I hereby certify that this instrument is a true and correct copy as shown by files and records in my office. WITNESS MY HAND and official seal this May 22, 1970.

J. F. McCRACKEN

Clerk Criminal Court of Record

By: Lyle D. Fuller

D.C.



**APPENDIX I**

**EXHIBIT "E"**

Law Offices of

PAUL, LANDY, BEILEY & BARTEL
341 Pan American Bank Building
Miami, Florida 33131

Area Code 305 - 377-0201 - Cable "Paulan"

May 22, 1970

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Glenn Gilson, Esquire
Trial Attorney
Office of the Assistant Regional Counsel
Internal Revenue Service
Room 1220 Federal Building
Miami, Florida

Re: Efrain T. Suarez
Seizure of Alleged Appointment Data
January 2, 1964

Dear Sir:

The undersigned is and has been attorney for Efrain T. Suarez of 2710 Natoma, Miami, Florida for several years in connection with efforts to procure the overturning of a conviction arising out of a search, seizure and arrest of the said Efrain T. Suarez, on or about January 2, 1964,

by agents of the City of Miami Police Department, Sheriff's Deputies of Dade County and Hillsborough County and/or representatives of the State Attorney's office.

After more than six years of continuous litigation, the Defendant, Efrain T. Suarez, was successful in overturning his conviction and in securing an Order Directing the Return of Property Seized during this raid. The premises were at 574 S.W. First Street, Miami, Florida.

Herewith enclosed for background information is a copy of the Federal Court Order Granting Petition for Writ of Habeas Corpus filed August 8, 1969 in the case styled Efrain T. Suarez v. Louie L. Wainwright, Director of Division of Corrections, State of Florida, No. 69-145-Civ-WM. Subsequent thereto, our office, on behalf of Dr. Suarez, moved for entry of a pro forma order — as a corrolary to the Order suppressing the evidence illegally seized — for the return of the actual personal property taken in the subject raid. The Federal Court, while it indicated it had power and jurisdiction as well as the inclination to grant the requested relief, suggested that the application for same be made to the State Court, wherein he was convicted. A carbon copy of the Federal Court Order to this effect, filed May 4, 1970, is also enclosed for your background information.

In accordance with the Federal Judge's suggestion, our office moved promptly before the State Criminal Judge for the return of personal property, as is required under State law. See Fla. Stat. Sec. 933.14. On this day, the Honorable Carling Stedman entered his Order Directing the return of all property seized, as reflected in the certified copy of same herewith enclosed.



Promptly after this hearing, the undersigned communicated with representatives of the various State agencies involved and learned that shortly after the January 2, 1964 raid, a copy of alleged appointment data was requested by and given to agents of the United States Internal Revenue Service. Further communication this day with Dr. Suarez has led us to communicate with his tax counsel, Greenberg, Traurig & Hoffman, who have advised us that at this very moment, United States Department of Justice or agents of the Internal Revenue Service are planning to use these illegally seized documents in a forthcoming Tax Court case against Dr. Suarez, which we understand to be scheduled for June 8, 1970. If you will carefully review the terms of the State Court Order Directing the Return of Illegally Seized Property, herewith enclosed, you will see that the Federal authorities, being in privy with the State agents conducting the raid, are required to return all illegally seized items, along with all copies of same. In connection with the latter aspect, I cite you to the decision of Goodman v. U.S., 369 F.2d 156 (9th Cir. 1966), which treats copies of illegally seized documents in the category of originals.

This letter will constitute a formal demand upon you and all members of your office and staff to forthwith (in the words of the enclosed Order) return to Efrain T. Suarez, through the undersigned, all originals and copies of all documents seized in the January 1964 raid. A self-addressed stamped envelope is enclosed to enable your immediate compliance.

If there is one among you or the named addressees set out in the attached list who can authoritatively state how

many originals or copies of seized Exhibits are in the possession of Federal authorities, we should like that assurance.

I must assume that in their preparation for the trial before the Tax Court, the various representatives of the United States that have been involved were not aware of the results of the Federal habeas corpus action. Now, however, you are formally made aware of the results in both State and Federal Court and demand is herewith formally made upon you and each of you to forthwith desist from further invasion of Dr. Suarez's constitutional rights by continued retention of any originals or copies of these illegally seized documents.

I will await your compliance, not later than by May 27, 1970.

Very truly yours,

STANLEY JAY BARTEL

Stanley Jay Bartel

SJB:jy
Enclosures

(See attached list for additional addresses)



Additional Addresses

1) Assistant Regional Counsel
In charge of Miami Branch Office,
Regional Counsel's Office
Internal Revenue Service
Federal Building — 51 S.W. 1st Avenue
Miami, Florida

2) Assistant Chief — In charge of
Miami Branch Office
Appellate Division
Internal Revenue Service
Federal Building — 51 S.W. 1st Avenue
Miami, Florida

3) Assistant Chief — In charge of
Miami Branch Office
Intelligence Division
Internal Revenue Service
Federal Building — 51 S.W. 1st Avenue
Miami, Florida

4) Homer C. Cline, Special Agent
Intelligence Division
Internal Revenue Service
Federal Building — 51 S.W. 1st Avenue
Miami, Florida

5) Greenberg, Traurig, Hoffman & Lipoff
Attorneys-at-Law
Northeast Airlines Building
150 S.E. Second Avenue
Miami, Florida

## APPENDIX J

[TITLE OMITTED]

## ORDER TO SHOW CAUSE

THIS CAUSE having come on before the Court on sworn Motion, and the Court having considered same, and the record of this cause, and being fully advised in the premises, it is thereupon:

ORDERED and ADJUDGED that:

1. The Commissioner of Internal Revenue Service, through each and every local agent, representative and attorney responsible, at the local level, for the custody or use in Tax Court Case, Docket No. 4169-67 of any evidence, or copies thereof, originally seized by State and/or Municipal Officials in the raid on the Ayala Clinic, 574 S.W. First Street, Miami, Florida, conducted on or about January 3, 1964, be and they are each hereby ordered and directed to personally appear before this Court at 9:30 o'clock A.M. on the 10th day of June, 1970, to show cause, if any there be, why they should not be adjudged in contempt of this Court's Order Directing the Return of Property Seized of May 22, 1970, a true copy of which is attached hereto as Exhibit "A", and be dealt with appropriately, to include potential assessment of attorneys' fees, for:

(a) Willful, knowing and obstinate refusal to turn over to counsel of record for the Defendant herein, after due demand, all the evidence and/or copies thereof



described above, which they, as privies of the State and/or Municipal agents, held as of the date of demand and apparently still hold; and

(b) Issuance of a subpoena duces tecum, a true copy of which is hereto attached as Exhibit "B", openly defying the carrying out and intent of this Court's Order of May 22, 1970, restoring full possession, with constitutional immunity, of all illegally seized materials to this Defendant.

2. Certified copies of this Order shall be served, forthwith, by the Sheriff of Dade County, upon the following local Federal Agents:

Glenn Gilson
Trial Attorney
Office of the Assistant Regional Counsel
Miami Branch Office of the
Internal Revenue Service
Federal Building
51 S.W. First Avenue
Miami, Florida

Roger T. Cable
Internal Revenue Officer
Miami Branch Office of the
Internal Revenue Service
Federal Building
51 S.W. First Avenue
Miami, Florida

Homer C. Cline
Special Agent, Intelligence Division
Miami Branch of the Internal Revenue Service
Federal Building
51 S.W. First Avenue
Miami, Florida

Robert W. Rust
United States Attorney for the
Southern District of Florida
Main Post Office Building
300 N.E. First Avenue
Miami, Florida

Head of Intelligence Division
Miami Branch Office of the
Internal Revenue Service
Federal Building
51 S.W. First Avenue
Miami, Florida

A. V. Wootten, Assistant Chief
Appellate Division
Internal Revenue Service, Miami Branch Office
Federal Building
51 S.W. First Avenue
Miami, Florida

Dennis Fox
Assistant Regional Counsel
Miami Branch Office of the
Internal Revenue Service
Federal Building
Room 1220, 51 S.W. First Avenue
Miami, Florida



3. Certified copies shall be mailed, certified mail, return receipt requested, to the following regional and national Federal agents:

Randolph W. Thrower
Commissioner of Internal Revenue
Department of Treasury
15th and Pennsylvania Avenue, N.W.
Washington, D.C.

John N. Mitchell
Attorney General of the United States
Department of Justice
Constitution Avenue and 10th Street, N.W.
Washington, D.C.

Andrew J. O'Donnell, Jr.
District Director of Internal Revenue
Internal Revenue Service
400 West Bay Street
Jacksonville, Florida

Dick Elliott
Chief of Intelligence Division
Internal Revenue Service
275 Peachtree Street, N.E.
Atlanta, Georgia

Louis M. Tigh
Chief of Appellate Division
Internal Revenue Service
275 Peachtree Street, N.E.
Atlanta, Georgia

Henry C. Stockell, Jr.
Regional Counsel
Internal Revenue Service
275 Peachtree Street, N.E.
Atlanta, Georgia

4. The Clerk of this Court shall provide, without charge, all necessary certified copies required to effect the foregoing service.

DONE and ORDERED at Miami, Florida, this 5th day of June, 1970.

CARLING STEDMAN
Judge, Criminal Court of Record

I hereby certify that this instrument is a true and correct copy as shown by files and records in my office. WITNESS MY HAND and official seal this June 5, 1970.

J. F. McCRACKEN
Clerk Criminal Court of Record

By: CHARLES C. PAGE
D.C.



## APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 70-821-Civ-CF

STATE OF FLORIDA,
Plaintiff,

vs.

EFRAIN T. SUAREZ,
Defendant.

### ORDER

Petitioner, the Commissioner of Internal Revenue Service by the United States Attorney for the Southern District of Florida, having filed a Petition for Removal of the case of STATE OF FLORIDA, Plaintiff vs. EFRAIN T. SUAREZ, Defendant, No. 64-457 (Stedman), in the Criminal Court of R Record in and for Dade County, Florida, pursuant to Section 1442, Title 28, United States Code, and the Court being fully advised in the premises, is of the opinion that the Petition should be granted; it is therefore

ORDERED and ADJUDGED that the case of STATE OF FLORIDA, Plaintiff, vs. EFRAIN T. SUAREZ, Defendant, No. 64-457 (Stedman), in the Criminal Court of Record in and for Dade County, Florida, be removed to the United States District Court for the Southern District of

Florida, and that all further proceedings in the Criminal Court of Record in and for Dade County, Florida, be stayed.

DONE AND ORDERED at Miami, Florida, this 9th day of June, 1970.

/s/ W. O. Mehrtens

United States District Judge



## APPENDIX L

42 § 1985 PUBLIC HEALTH & WELFARE Ch. 21

SUBCHAPTER 1.—GENERALLY—Continued

§ 1985. Conspiracy to interfere with civil rights — Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons con-

spire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.
R.S. § 1980.

Supreme Court, U. S.
FILED
SEP 26 1975
MICHAEL RODAK, JR., CLERK

No. 75-144

# In the Supreme Court of the United States

OCTOBER TERM, 1975

EFRAIN T. SUAREZ, ET UX., PETITIONERS

*v.*

LOUIE L. WAINWRIGHT, DIRECTOR, DIVISION OF CORRECTIONS, STATE OF FLORIDA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-144

EFRAIN T. SUAREZ, ET UX., PETITIONERS

*v.*

LOUIE L. WAINWRIGHT, DIRECTOR, DIVISION OF CORRECTIONS, STATE OF FLORIDA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners seek review of the decision below holding that they were not entitled to an award of attorneys' fees and costs incurred in litigation against state and federal officials.

The pertinent facts are as follows: The Commissioner of Internal Revenue determined income tax deficiencies and negligence penalties against petitioners for 1963 and 1964. The deficiencies were based upon evidence obtained by the Internal Revenue Service from officers of the Miami, Florida, Police Department (Pet. App. II 5). Upon review of the deficiencies, the United States Tax Court determined that



593-422—75——1

the seizure of the evidence, upon which the asserted deficiencies were based, violated petitioners' rights against unreasonable searches and seizures (Pet. App. II 15), and expunged the asserted deficiencies (Pet. App. II 26–35).

While their case was pending in the Tax Court, petitioners commenced this action in the United States District Court for the Southern District of Florida against various state and federal officials [1] to recover the attorneys' fees and expenses incurred in the Tax Court and in this action (Pet. App. I 21–24). The district court held (Pet. App. I 37–38) that the federal respondents were acting within their authority in investigating and determining petitioners' correct tax liability, and that the action was an unconsented suit barred by sovereign immunity. Alternatively, the court held that the action was barred by the statute of limitations. The court of appeals affirmed (Pet. App. I 1–5).

1. The decision below correctly held that petitioners' action against the federal respondents was barred by sovereign immunity. This Court has on many occasions reaffirmed the general rule that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration" (*Land* v. *Dollar,* 330 U.S. 731, 738). See also *Larson* v. *Domestic & Foreign*

[1] The federal officials named in the complaint (Pet. App. I 13) were the Attorney General, the Commissioner of Internal Revenue, and various other officers and employees of the Internal Revenue Service and "each of the said named individuals' successors and subordinates."



*Corp.,* 337 U.S. 682, 704; *Dugan* v. *Rank,* 372 U.S. 609, 620. Although the named defendants are the Attorney General and the Commissioner of Internal Revenue, "it has long been established that the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign" (*Larson* v. *Domestic & Foreign Corp., supra,* 337 U.S. at 687).

Here, petitioners are not suing the named federal respondents in their individual capacities but are seeking expenses incurred as a result of certain actions those respondents took in their official capacities as administrators of the federal tax laws. Thus, absent congresional consent to such a suit, it is barred by sovereign immunity. There is, however, no such consent. As the district court correctly observed (Pet. App. I 38), the Federal Tort Claims Act, 28 U.S.C. 2671, *et seq.,* contains a special exception for "any claim arising in respect of the assessment or collection of any tax * * *" (28 U.S.C. 2680(c)).

2. Petitioners' claim (Pet. 20) against the federal respondents under the Civil Rights Act, Rev. Stat. Sections 1979 and 1980, 42 U.S.C. 1983, 1985, is similarly defective. Section 1983 is inapplicable because it is limited to deprivations of constitutional rights made under color of state law. See, *e.g., Williams* v. *Rogers,* 449 F.2d 513 (C.A. 8), certiorari denied, 405 US. 926. Here, however, the purported constitutional deprivation by the federal respondents was the determination of income tax deficiencies against petitioners under federal law. Section 1985,

which creates a civil action for various conspiracies to interfere with the civil rights of a person or class of persons, is also inapplicable to petitioners' claim. See, *e.g., Koch* v. *Zuieback,* 316 F.2d 1 (C.A. 9) See also *Griffin* v *Breckenridge,* 403 U.S. 88.

Contrary to petitioners' argument (Pet. 19–20), *Bivens* v. *Six Unknown Agents,* 403 U.S. 388, does not support their claim for attorneys' fees and costs. In *Bivens,* the Court held that a cause of action for damages arose where an individual's Fourth Amendment rights had been violated by federal officers acting under color of their federal authority. Here, however, the federal respondents took no part in any violations of petitioners' rights which may have been occasioned by the search and seizure conducted by the local police (see Pet. App. II, 5, 19, 21).

Nothing in *Bivens* suggests that damages might be awarded against a federal official who was not connected or involved with the unconstitutional intrusion and whose only actions were accepting evidence from the local police and determining tax deficiencies on the basis of such evidence. Indeed, the question whether a federal tax assessment is invalid when the Internal Revenue Service's knowledge of the taxpayer's liability and its computation of the amount due are based upon evidence obtained by local police pursuant to an illegal search is currently before the Court in *United States* v. *Janis,* No. 74–958, certiorari granted, June 9, 1975.

3. The decision below is in accord with the general rule that attorneys' fees are not ordinarily recoverable. See *F. D. Rich Co.* v. *Industrial Lumber Co.,* 417 U.S. 116, 126. While there are exceptions to this



rule, they are limited to cases where there is specific statutory authority for such an award, particularly where government officers are the parties against whom recovery is sought. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 717. Here, as the court of appeals noted (Pet. App. I 4), the specific statute dealing with the subject, 28 U.S.C. 2412,[2] does not authorize but in fact precludes recovery of attorneys' fees as costs from the federal government. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* No. 73–1977, decided May 12, 1975 (slip op. 25–28); see also *Pyramid Lake Paiute Tribe of Indiana* v. *Morton,* 499 F.2d 1095 (C.A.D.C.), certiorari denied, 420 U.S. 962

For the reasons stated, the petition for a writ of certiorari, as it pertains to the federal respondents, should be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

SEPTEMBER 1975

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[2] 28 U.S.C. 2412 provides as follows:

"**Costs.** Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States."

U.S. GOVERNMENT PRINTING OFFICE: 1975

Supreme Court, U. S.
FILED
AUG 26 1975
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

**OCTOBER TERM 1975**

**NO. 75-144**

EFRAIN T. SUAREZ, et al.,

*Petitioners,*

*vs.*

LOUIE L. WAINWRIGHT,
Director, Division of Corrections,
State of Florida, et al.,

*Respondents.*

## Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

STUART L. SIMON
Dade County Attorney
*Attorney for Respondents Dade County and Dade County Officials*
1626 Dade County Courthouse
Miami, Florida 33130
and
ROBERT A. GINSBURG
Assistant County Attorney
*Attorney for Respondents Dade County and Dade County Officials*
1626 Dade County Courthouse
Miami, Florida 33130

MIAMI REVIEW — 371-4853 — 377-3721

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in the

# Supreme Court

of the

# United States

OCTOBER TERM 1975

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NO._____

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EFRAIN T. SUAREZ, et al.,
*Petitioners,*

*vs.*

LOUIE L. WAINWRIGHT,
Director, Division of Corrections,
State of Florida, et al.,
*Respondents.*

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**Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## INTRODUCTION

This Brief is submitted on behalf of the following Respondents in this cause:

(a) Dade County, Florida, a political subdivision of the State of Florida.

(b) Richard E. Gerstein, State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County, Florida.

(c) Michael Daugherty, a Special Investigator employed in and by the office of the aforesaid State Attorney.

(d) Barbara Williams, a policewoman who in this case received her instructions from the aforesaid State Attorney.

(e) Myrtle Ellison, a policewoman who in this case received her instructions from the aforesaid State Attorney.

The last four named Respondents will be referred to throughout this Brief as the County Officials.



## STATEMENT OF THE CASE

Although the basic physical facts recited in the Statement of the Case contained in the Petition for Writ of Certiorari are factually correct, the recitation also contains such emotionally charged adjectives and adverbs that it cannot be regarded as a straightforward and objective narrative of the circumstances. The Respondents submitting this Brief would therefore call the Court's attention to the clear, objective, and simple statement of the factual circumstances set out in Judge Tuttle's opinion written without dissent for the United States Court of Appeals for the Fifth Circuit. They respectfully request that the statement of the case contained in that opinion be regarded as their statement of the case for the purposes of this Brief. For the convenience of the Court the aforesaid statement of facts is set forth below:

We here deal with the final chapter in a tale of three lawsuits arising in the Southern District of Florida, as a result of which the original plaintiff, the appellant here, has, by action of the United States Tax Court, received full relief in the matters originally litigated but who now complains that the trial court declined to award him his attorney's fees.

Suarez has been attempting for some five years to prevent the Internal Revenue Service from utilizing copies of records which had been seized from his office on January 3, 1964 by police officers of Dade County, Florida and which had been used to produce his conviction for performing illegal abortions. The first of these efforts

was made in connection with his filing a petition for release from the state court conviction by writ of habeas corpus on the ground that his conviction had been obtained by the use of the illegally seized records. Asserting that the state officials had furnished copies of the records to the Internal Revenue Service agents, he amended his petition for habeas corpus to seek an injunction against the IRS officials. He subsequently filed a second civil suit seeking an injunction against the use of evidence, based on alleged violations of his Fourth and Fifth Amendment rights.

Following the grant of the writ of habeas corpus by the federal court, Suarez was released from his state conviction and was not brought to trial a second time. Thereupon the state court issued an order directing all officers, both state and federal, to surrender the records and all copies thereof to the plaintiff. Upon the failure of the Internal Revenue officials to return the copies that they possessed criminal contempt proceedings were filed in the state court against the federal officials. This case was removed to the federal court, and this became the third prong of the litigation which we now bring to a close. Claims for damages against the state and federal officials for their illegal use of the evidence have been abandoned by the appellant.

The trial court dismissed the removed state criminal contempt proceedings and initially granted a preliminary injunction against the use by the federal officials of the illegally obtained



evidence. However, when the case came on for final hearing, the trial court dismissed the other two complaints as well, primarily on the authority of Brittingham v. C.I.R., 451 F.2d 315 (5th Cir. 1971). The trial court noted that the question whether the evidence obtained from the illegal search by the state officers could be used in the civil tax proceeding which had been instituted on behalf of the federal agents upon having received access to the documents taken from Suarez's office could be determined in the Tax Court upon proper motion being made by the taxpayer.

The trial court dismissed the claim for damages against the state officials on the ground that any action against them was barred by the three-year statute of limitations. The court also found that there was no personal liability on the part of the federal officers, because, unlike the case in Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) there was no unconstitutional activity undertaken by the agents themselves, but rather they were operating solely within their official capacity. The court held further that the Federal Tort Claims Act did not waive sovereign immunity because it expressly provides that its waiver of immunity was not applicable to claims arising out of the assessment or collection of a tax.

As contemplated by the district court, the Tax Court, upon motion duly made by the taxpayer, held in a well-considered opinion that the evidence obtained by virtue of the illegal raid could not be utilized in the civil tax case against Sua-

rez. It held that the concession by the Commissioner that his determination of some $700,000 of tax deficiency was based solely upon the illegally seized records destroyed the presumption of correctness of the determination. A decision was therefore entered in favor of the taxpayer. Suarez v. Commissioner, 58 T.C. No. 78 (Filed Aug. 10, 1972.) Although notice of appeal was filed by the Commissioner in the tax case, the appeal was subsequently dismissed by stipulation. Thus, Dr. Suarez's original complaint, which had as its purpose the prevention of the use by the IRS agents of the illegally obtained evidence in a tax case against him, was mooted. There is therefore nothing left on the merits of the original three complaints which were dismissed by the trial court, and which are on appeal here now.

However, Dr. Suarez contends that the effort and delay and concern which he suffered before finally prevailing on the principal issue warrants his recovering an attorney's fee against the federal officials. He claimed against the state officials as well, but it is clear that any claim against them, even if otherwise permissible, cf., Named Individual Members San Antonio Conservation Society v. Texas Highway Dept., 496 F.2d 1017, 1026 (5th Cir. 1974) would be barred by the statute of limitations.

We can find no basis on which attorney's fees could be allowed in this kind of action against the federal officials. In fact, as pointed out in the San Antonio case just cited we noted that the



parties there conceded that the federal defendants are immunized from an award of attorney's fees by provisions of 28 U.S.C. §2412.[1]

As we have stated, the injunction issue has been mooted by the action of the Tax Court, taken following the decision of the district court in these cases. In such circumstances there is nothing left to be tried. The appeal must therefore be dismissed.

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[1]This section provides as follows:

§2412. Costs.

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and 2517 of this title for the payment of judgments against the United States. As amended July 18, 1966, Pub.L. 89-507, §1, 89 Stat. 308.

## QUESTIONS PRESENTED

I.

WHETHER RESPONDENT DADE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, CAN BE HELD LIABLE UNDER CIVIL RIGHTS OR OTHER FEDERAL STATUTES FOR ACTS COMMITTED IN THE PERFORMANCE OF ITS GOVERNMENTAL FUNCTIONS?

II.

WHETHER THE MONEY CLAIMS AGAINST RESPONDENT DADE COUNTY OFFICIALS WERE BARRED BY FLORIDA STATUTES OF LIMITATION IN .THE ABSENCE OF ANY STATED LIMITATIONS PERIOD IN THE FEDERAL CIVIL RIGHTS ACTS?

III.

WHETHER PETITIONERS ARE ENTITLED TO ATTORNEYS' FEES OR COSTS ON ANY OTHER BASIS IN THIS CAUSE?



## POINT I

WHETHER RESPONDENT DADE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, CAN BE HELD LIABLE UNDER CIVIL RIGHTS OR OTHER FEDERAL STATUTES FOR ACTS COMMITTED IN THE PERFORMANCE OF ITS GOVERNMENTAL FUNCTIONS?

The Trial Court dismissed Counts III and IV of the Amended Complaint as to Dade County on the ground that acts committed by that governmental entity in the performance of its governmental functions did not constitute a cause of action for money damages under the Civil Rights Acts. Such dismissal was correctly based upon *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Mayhue v. City of Plantation*, 375 F.2d 447 (5th Cir. 1967); *Hill v. City of El Paso*, 437 F.2d 352 (5th Cir. 1971); and *Mareno v. Henckle*, 431 F.2d 1299 (5th Cir. 1970).

Since the issuance of the Trial Court's order, the point of law upon which the Court relied has been reinforced by such cases as *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973); *Yumick v. Cotter*, 452 F.2d 59 (7th Cir. 1971); *Collins v. State of Florida*, 432 F.2d 60 (5th Cir. 1970); and *Via v. Cliff*, 470 F.2d 271 (3rd Cir. 1972). In the *Moor* case this Court painstakingly traced the history of Sec. 1983, U.S.C.A., and found there were no exceptions which could be used as a basis of claim for money damages against either counties or municipalities.

## POINT II

WHETHER THE MONEY CLAIMS AGAINST RESPONDENT DADE COUNTY OFFICIALS WERE BARRED BY FLORIDA STATUTES OF LIMITATION IN THE ABSENCE OF ANY STATED LIMITATIONS PERIOD IN THE FEDERAL CIVIL RIGHTS ACTS?

The language of the Trial Court's opinion on this point reads:

> With respect to the individually named defendants under Count III, the action must also be dismissed. Count III is founded upon the Civil Rights Statutes and upon claims for deprivation of plaintiffs' constitutional rights based upon the Supreme Court's recognition of such a claim in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The actions of defendants for which damages are sought occurred on January 3, 1964, more than six years prior to the institution of the present action. It is well recognized that because no statute of limitations is specified in the Civil Rights Statutes (which are part of the basis for plaintiffs' claim here) the applicable state limitation periods should be adopted. Shank v. Spruill, 406 F.2d 756 (5th Cir. 1969); Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967). The Fifth Circuit has interpreted the Civil Rights Statutes as falling within the three-year limitation period under F.S. §95.11(5)(a). Nevels v. Wilson, 423 F.2d 691 (5th Cir. 1970). Even if this action were



> deemed to fall within the purview of the more liberal four-year limitation period under F.S. §95.11(4), it would likewise be barred.

Plaintiffs' claims under Count III are, however, founded upon a Bivens claim aside from the Civil Rights Statutes. The Supreme Court when it recognized the existence of a claim founded upon a constitutional deprivation in Bivens did not reach the issue of limitation of that form of action. In the absence of any authority from either the Supreme Court, or the Fifth Circuit, this Court is of the opinion that the claim under Bivens should, by analogy to the Civil Rights Statutes, borrow the state statute of limitations applicable under Nevels v. Wilson, supra. Count III must also be barred under either the three- or four-year Florida Statute, F.S. §95.11, and is therefore dismissed.

Petitioners grasp at the *Janis* (*United States v. Janis*, Case No. 74-958) straw like drowning men and contend that this case is a "Bivens" type of action and therefore somehow distinguishable. Respondent County Officials would point out that the *Bivens* action pertained only to Federal officials (*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)). However, even if a *Bivens* type claim is available against state and local officials, there are no stated periods of limitation applicable to federal civil actions prosecuted under *Bivens* or the Civil Rights Acts. Petitioners in such circumstances contend that the Federal Courts should now create a limitations period by decree which would permit them (the Suarezes) to obtain the relief they wish retro-

actively. Your Respondents contend to the contrary and maintain that, when there is no federally legislated period of limitation, the applicable state statute of limitations must be applied. This position is buttressed on the realization that, if utter chaos is to be avoided, some limitations period must accompany every legal remedy created for the benefit of citizens.

It is well settled in the Fifth Circuit as well as other circuits that a statute of limitations is not tolled by a plaintiff's incarceration. *Knowles v. Carson*, 419 F.2d 369 (5th Cir. 1969); *Campbell v. Weatherford*, 427 F.2d 131 (5th Cir. 1970); *Henig v. Odorioso*, 256 F.Supp. 276 (E.D.Pa.1966), *aff'd.* 385 F.2d 491 (3rd Cir. 1967), *cert. den.*, 390 U.S. 1016 (1968), *reh. den.*, 391 U.S. 929 (1968).

Similarly, on the question of whether the accrual of a civil rights action for an allegedly impermissible search is postponed until the validity of the search and seizures has been adjudicated, there is a Ninth Circuit case directly on point. In *Strung v. Anderson*, 452 F.2d 632 (9th Cir. 1971), the Court held that the accrual of a civil rights action based on an allegedly impermissible search was *not* postponed until the validity of the search and seizure had been adjudicated.

Thus, Respondent County Officials believe that they have shown that the Florida statute of limitations is an absolute bar to the suit of Petitioners, and the limitation period was not tolled by incarceration or any other factor in this cause.



## POINT III

### WHETHER PETITIONERS ARE ENTITLED TO ATTORNEYS' FEES OR COSTS ON ANY OTHER BASIS IN THIS CAUSE?

The final paragraph on page 27 of the Petition for Writ of Certiorari makes it evident that Petitioners have limited their claim to attorneys' fees and costs. This being so, it would appear that their petition for relief in this regard should have been addressed to the Tax Court, a forum in which they were successful, rather than to the Federal District Court where the first four counts of their complaint were dismissed.

Further, Rule 9 of the Federal Rules of Civil Procedure requires:

> "When items of special damages are claimed, they shall be specifically stated."

The Petitioners, having failed to specifically claim attorneys' fees in their complaint or amended complaint, are now barred from asserting a claim for such relief at this juncture of the proceedings.

## CONCLUSION

For the reasons stated above and for the reasons so clearly articulated by the Court in the recent case of *Alyeska Pipeline Service Co. v. Wilderness Society*, ____U.S.____, 44 L.Ed.2d 141, 95 S.Ct.____ (1975), your Respondents ask that the writ herein sought be denied.

Respectfully submitted,

STUART L. SIMON
*Dade County Attorney and*
*Attorney for Respondent*
*County Officials*
1626 Dade County Courthouse
Miami, Florida 33130

By: Stuart L. Simon
STUART L. SIMON
and

By: Robt A. Ginsburg
ROBERT A. GINSBURG
*Assistant County Attorney*



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this 25th day of August, 1975, to: Office of Attorney General, The Capitol, Tallahassee, Florida; Scott P. Crampton, Assistant Attorney General, Department of Justice, Tax Division, Washington, D.C. 20530; Clemens Haggland, Esquire, Assistant United States Attorney, 300 Ainsley Building, Miami, Florida; John S. Lloyd, Esquire, City Attorney, 65 S.W. First Street, Miami, Florida 33130; and Stanley Jay Bartel, Noriega & Bartel, P.A., 2100 First Federal Building, One S.E. 3rd Avenue, Miami, Florida 33131.

Stuart L. Simon
STUART L. SIMON

Supreme Court, U. S.
FILED
JUL 26 1975
MICHAEL RODAK, JR., CLERK

# in the Supreme Court of the United States

**OCTOBER TERM 1975**

**NO. 75-144**

EFRAIN T. SUAREZ, et al.,
*Petitioners,*

*vs.*

LOUIE L. WAINWRIGHT,
Director, Division of Corrections,
State of Florida, et al.,
*Respondents.*

## APPENDIX II

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MIAMI REVIEW — 371-4853 — 377-3721

is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment.

The petitioners have the burden of proof on this issue. Vaira v. Commissioner, 444 F.2d 770 [28 AFTR 2d 71-5033] (C.A. 3, 1971); Cleveland Chiropractic College v. Commissioner, 312 F.2d 203 [11 AFTR 2d 528] (C.A. 8, 1963), affirming a Memorandum Opinion of this Court; Inter-American Life Ins. Co., 56 T.C. 497 (1971); on appeal; Terry C. Rosas, 46 T.C. 631 (1966); Harold E. Harbin, 40 T.C. 373 (1963); Carroll F. Schroeder, 40 T.C. 30 (1963). Since they have failed to prove that the respondent's determination is erroneous, or even to clarify the issue, they must suffer the consequences. James S. Reily, 53 T.C. 3 (1969); James W. England, Jr., 34 T.C. 617 (1960). See also Journal Co., 46 B.T.A. 841 (1942), reversed on another ground, 134 F.2d 165 [30 AFTR 1045] (C.A. 7, 1943). Under the circumstances we are impelled to sustain the respondent's determination as to the additions to tax.

To reflect the concessions made by the parties and the conclusions reached herein,

*Decisions in all dockets will be entered under Rule 50.*

¶ 58.77 TC No. 78. EFRAIN T. SUAREZ and ZENAIDA SUAREZ. Docket No. 4196-67. 8-10-72. Opinion by HOYT, J. Years, 1963, 1964. Motions to strike affirmative allegations of amended answer, to suppress evidence and to quash subpoenas, granted; motions for judgement on the pleadings, to dismiss for lack of jurisdiction, to quash deficiency notice, to return property and to shift burden of proof, denied.

CRIMES—Evasion and failure to pay tax or file return—evidence obtained by illegal means. Evidence upon which IRS determination was based suppressed: Evidence was obtained as result of an unreasonable search and seizure. Officials conducting raid failed to obtain warrants and failed to make announcement as to purpose. *Ref:* 1972 P-H Fed. ¶ 38,506(5).

CRIMES—Evasion and failure to pay tax or file return—Constitutional guarantees and related matters. Evidence upon which IRS determination was based suppressed: Protections encompassed in 4th Amendment to U.S. Constitution are applicable in a civil tax proceeding. *Ref:* 1972 P-H Fed. ¶ 38,521.

TAX COURT—Burden of proof—presumption of correctness of Commissioner's determination. Presumption of correctness of Commissioner's determination was destroyed because determination was based solely on constitutionally tainted evidence. Burden of producing and going forward with proof shifts to Govt., who must present independent, untainted evidence. *Ref:* 1972 P-H Fed. ¶ 39,252(5); 39,255(50).

*Official Tax Court Syllabus*

The petitioners filed several pretrial motions in which they alleged the respondent based his determination in the statutory notice upon evidence which was obtained from the petitioner, Efrain T. Suarez, in violation of his constitutional rights.

[1] Held, the protections encompassed in the Fourth Amendment to the United States Constitution are applicable in a civil tax proceeding.

[2] Held, the order of a Federal District Court in a habeas corpus proceeding that a new trial be granted to petitioner, Efrain T. Suarez, was not a final and binding determination that evidence used against petitioner in a state criminal proceeding was seized in violation of his constitutional rights. An "independent inquiry" must be made by this Court to ascertain the legality of the seizure.

[3] Held, evidence employed by the respondent in making his determination was obtained as the result of an unreasonable search and seizure proscribed by the Fourth Amendment to the United States Constitution; state officials, in conducting a raid, failed to obtain warrants and failed to make an announcement as to purpose. Such evidence is suppressed and may not be used at trial.

[4] Held, because the respondent's determination in his statutory notice was based solely on constitutionally tainted evidence, the presumption of correctness normally attached to such determination is destroyed. The burden of producing and going forward with proof shifts to the respondent who must present independent, untainted evidence to sustain his asserted deficiency.

BEST COPY AVAILABLE

Martin J. Nash, for the petitioners.

Glen W. Gilson, II, for the respondent.

HOYT, *Judge:* The respondent has determined the following deficiencies in the petitioners' income tax and has imposed the following penalties:

| *Taxable Year Ended* | *Deficiency* | *Penalty (Section 6653(a))* |
|---|---|---|
| December 31, 1963 | $354,959.96 | $17,748.00 |
| December 31, 1964 | 353,649.62 | 17,932.48 |

The petitioners filed several motions in advance of trial in which they alleged that the respondent based his determination upon evidence which was obtained from them in violation of their rights under the United States Constitution.[1] A hearing was held on these motions at Miami, Florida, and, subsequently, briefs were filed by the parties relating to the issues presented.

Basically, the motions present the issues of (1) whether Fourth Amendment protections[2] are applicable in a civil tax proceeding; (2) whether the evidence employed by the respondent in making his determination was obtained as the result of an unreasonable search and seizure; and (3) whether the existence of constitutionally tainted evidence affects the respondent's determination and the proceedings in this Court relating thereto. Additionally, we must consider what effect, if any, should be given herein to a prior determination of the United States District Court for the Southern District of Florida in a habeas corpus proceeding involving the petitioner, Efrain T. Suarez.

## FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly. The stipulation of facts and exhibits thereto are incorporated herein by this reference.

The petitioners, Efrain T. Suarez and Zenaida Suarez, husband and wife, resided at 2710 Natoma Street, Miami, Florida, when they filed the petition herein. They filed joint Federal income tax returns for the years 1963 and 1964 with the district director of internal revenue, Miami, Florida.

In early 1964, an Information was returned against Efrain and several other individuals, charging them with conspiracy to perform an abortion and charging Efrain with an attempt to procure a miscarriage of a woman, which alleged crimes are felonies under Florida law. (See Florida Statutes Annotated, sections 797.01 and 775.03.[3])

These charges grew out of a raid conducted on January 3, 1964, by officials of the State Attorney's office of Dade County, Florida, and of the City of Miami, Florida. The raid took place at the premises of the Ayala Clinic. The parties have stipulated that Efrain has standing to contest the legality of the search and seizure of evidence following his arrest as a result of the aforementioned raid.

In the middle of November, 1963, the City of Miami Police Division and the State Attorney's office decided that they would try to make a case against the Ayala Clinic. An investigation took place

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[1] Five motions are considered herein. They are outlined in our Findings of Fact.

The respondent has agreed that for the purposes of this case, this Court may properly consider the petitioners' motion to suppress evidence in advance of the trial. On brief, he states:

> • • • [T]here is no rule of the Tax Court or even a rule of the Federal Rules of Civil Procedure which provides for a procedure under which motions to suppress evidence are heard prior to the trial of the case. • • • [I]n our view, normally the proper time for the Court to pass upon the admissibility of evidence is when it is offered at the trial. • • •
>
> • • • • • • • • • • • • • • • • • • •
>
> Nevertheless, the respondent has construed the hearing on petitioners' motions as in effect a hearing under Rule 23 of the Tax Court's Rules of Practice. Since respondent has stipulated that he intends to rely upon the seized appointment records with leads derived therefrom, respondent, under these circumstances and only for purposes of this case, agrees that the Court may pass upon at this time the use by respondent at the trial of the case of the records here involved. Were it not determined at this time that respondent would definitely rely upon such records in support of his determination it would be premature at this time for the Court to consider the admissibility of such records.

While we express no opinion as to the soundness of these conclusions, we note that where constitutional issues are presented, consideration of these issues in advance of trial may be necessary. We have considerable discretion with respect to the manner in which we accord and conduct a hearing into such questions. See Alderman v. United States, 394 U.S. 165, 183 (1969); Nardone v. United States, 308 U.S. 338, 342 (1939).

[2] As to Fifth Amendment protections, see footnote 13, infra.

[3] See footnotes 20 and 21, infra.

for a period of four to six weeks prior to the raid.

A general plan for the raid was developed, and two policewomen were enlisted to assist—Barbara Williams and Myrtle Ellison. Barbara came to Miami on December 27, 1963, and she received instructions from representatives of the State Attorney's office. She was told to go to Tampa, Florida, and call the clinic to make an appointment for an abortion.

Barbara contacted the Ayala Clinic on December 28, 1963, and made another call on January 2, 1964. She was able to make an appointment with Efrain to have an abortion performed on the morning of January 3, 1964. The price for the scheduled abortion was to be $1,000.

After making the appointment, Barbara contacted the State Attorney's office. She returned to Miami on the evening of January 2, 1964. In Miami, she executed an affidavit as requested by Arthur Huttoe, Assistant State Attorney. At that time in order to review the arrangements for the raid, she met with Glen L. Baron, Assistant Chief of the Miami Police Department, Michael Daugherty, Special Investigator from the State Attorney's office, and Malcolm E. Gracey of the Miami police department, the commanding officer of the Internal Security Squad. Also present at this meeting was Myrtle Ellison. The participants discussed the general plans for the raid that had been formulated.

As part of the plan, both policewomen —Barbara and Myrtle—would enter the premises of the Ayala Clinic and after money was paid over and arrangements made for the abortion, Myrtle would step outside the building as a signal for the raiding officers to enter the building and make the arrests. In the event that the raiding officers were unable to get into the clinic, the participants agreed that Barbara would arrest the doctor who was to perform the abortion before he commenced the medical procedure.

Barbara was a trained policewoman and had received normal police recruit training, including judo technique. She knew that the police officers would be at the back door of the Ayala Clinic, as well as at the front door. She knew that, when Myrtle left the clinic building, the raiding officers would enter, and that Myrtle's departure from the building would be a signal that the money had been paid over and the abortion was about to be performed.

A female informant had given information to Barbara as to the floor plan of the clinic, and Barabara had received a diagram. In addition, she was told that a person inside the clinic would place a bar across the door. Barbara advised the raiding officers of what she had been told by the informant.

Barbara was also aware that patients receiving abortions were put to sleep with an injection. She advised Daugherty that, as part of the "abortion procedure," she "would be there for a period of an hour or two and would get a needle, and it would be all over and she could leave in a couple of hours."

The raiding officers, prior to the raid, had investigated Efrain for attempted abortion. They had received information that Efrain was operating the Ayala Clinic (previously run by Dr. Ayala) and that he was using the cards and letterheads of the Ayala Clinic. The raiding officers had also read affidavits from people in New Jersey, who stated they had been to the clinic for abortions. In addition, Barbara executed an affidavit stating that she had contacted a person in the clinic for the purpose of obtaining an abortion.

The persons who actually took part in the raid on the clinic on January 3, 1964, were Chief Baron, Gracey, Daugherty, Detective Jack Elmore, Barbara, and Myrtle.

On the morning of January 3, 1964, the plan devised by the State Attorney's office and the Miami police was implemented. Barbara was given $1,000. The serial numbers on these bills were read off by Chief Baron. Gracey and Myrtle recorded the numbers. Then Barbara and Myrtle were driven to the Ayala Clinic.

The raiding party proceeded to follow their prearranged plan. Each of the raiding officers, including the policewomen, intended to arrest everyone in the clinic on abortion charges or on charges of conspiracy to commit abortion. However, the raiding officers had neither an arrest warrant nor a search warrant.

In carrying out her roles in the raid plan, Barbara "intended to go as far as necessary." If the other officers were unable to arrest Efrain, she would arrest him herself if he started the abortion or attempted to give her an injection.

Barbara and Myrtle entered the clinic at 8:00 A.M. on January 3, 1964,

through an unlocked public front door which was marked "open." The front door opened into a waiting room. Above the front door was a sign on which Efrain's name appeared.

Gracey, Daugherty and Baron parked about a block away. The police officers remained on station during the time that the policewomen were in the clinic.

Barbara rang a bell which was located in the waiting room near an inner door. After she rang the bell, Barbara and Myrtle could hear a key unlocking the inner door. This inner door had a steel bar across it on the inside.[4] In addition, it had a two-way mirror and a peephole. Efrain entered the waiting room after opening the door and met the policewomen. He then took them through the same door and relocked it, replacing the steel bar.

Inside the clinic, Efrain left Myrtle in another waiting room and took Barbara to an examination room where he examined her. Then in Myrtle's presence, Efrain took the $1,000 from Barbara. (This money, the serial numbers of which had been recorded, is hereinafter referred to as the "marked" money.) Efrain told Barbara, also in Myrtle's presence, that he would give her a shot with a needle. Barbara stated that she did not want the shot since she could stand the pain. After receiving the marked money, Efrain asked Barbara to get undressed. Myrtle told Efrain she was leaving to get breakfast and would return.

Myrtle then attempted to leave by the door through which she entered. She removed the steel bar but was still unable to open it. After about a minute of shaking the door, Efrain came up behind her and unlocked it. As she left, she could hear the inner door being relocked.

After Myrtle left, Barbara went into a bathroom to "undress." Barbara was not armed and had nothing with her to identify her as a policewoman.

The policewomen were in the clinic for between 20 to 25 minutes before Myrtle came out.

Myrtle signaled to the other officers who came to the front of the clinic. Myrtle told the raiding officers that Barbara was inside, that the money had passed hands, and that Barbara was about to receive an injection.

Daugherty, Chief Baron, Gracey and Myrtle went through the public street door and knocked on the closed inside door off the public waiting room. They received no response. They immediately knocked again and announced that they were police officers and were from the State Attorney's office, and they said: "Open up." They heard no sounds coming from the clinic. Myrtle told them to hurry, repeating that Efrain was going to give Barbara a shot. They waited for 15 to 30 seconds, and when they received no response, they knocked one more time. Then they proceeded to break the door down. No announcement of purpose was made by the raiding officers.

The officers broke down the inside door and entered the clinic in order to arrest Efrain and others in the building and to obtain evidence of their suspected crimes. There was considerable confusion as they made their entry. Barbara was still in the bathroom and could hear the ensuing commotion.

Once in the clinic, Daugherty and Gracey saw Efrain coming toward them down the hallway. They arrested him and told him to sit on a couch in the front room. While Gracey secured Efrain, Daugherty attempted to find Barbara. He located her when he kicked in the locked bathroom door (an act which startled her). Daugherty then continued to search the clinic to arrest other persons employed there.

In the meantime, Gracey was looking for the marked money. He searched Efrain but could not find it on his person. He then began a search of the clinic to locate the money.

A short time later, Daugherty requested that Efrain open a wall safe discovered by Elmore. When Daugherty indicated he would open it with a sledge hammer if Efrain would not comply, Efrain opened the safe. Papers removed therefrom were placed in Gracey's custody.

One of the clinic's female employees disappeared after Efrain was arrested, and the raiding officers had to make a search to locate her. She was found in a room which she had entered through a trap door located in a broom closet.

[4] At the time of the raid, all of the officers knew about this bar.

Chief Baron had stayed outside the building until he was relieved by a uniformed police officer. He then entered the building. The names of the people arrested were then being taken down. Gracey was with Efrain and with women who had been arrested by the raiding officers. Daugherty returned to the front room area, where the people who had been arrested were seated, and he proceeded to assist Chief Baron and Gracey.

While searching for the marked $1,000, Gracey seized 41 pages of Efrain's daily records, with names and dates on them, (hereinafter referred to as the "disputed records") from the office portion of the clinic.[5] Two of the 41 sheets of disputed records were found on top of Efrain's desk and the other sheets, not in plain view, were found in his desk. These records were seized within minutes after Efrain was arrested. The marked money had not yet been located. The search of the Ayala Clinic to find the marked money was conducted for at least two hours.[6]

The raiding officers searched a chair on which Efrain had been sitting and seized $2,650 in cash in a paper bag under the cushion. Included in this amount was the marked $1,000.

During this search of the entire clinic, the raiding officers seized, as evidence, various medical instruments and supplies, promissory notes, jewelry, car titles, the disputed records, and $2,650 in currency, including the marked $1,000. No evidence was seized from the room off the broom closet. All of the seized evidence was taken only from the clinic.

When Daugherty returned to his office the day of the raid, he had in his custody the daily records seized at the Ayala Clinic. Upon his return he was advised of a telephone call that had been received from the Internal Revenue Service. He returned the call and arranged a meeting with representatives of the Internal Revenue Service, which was held three or four days later. At that time, Daugherty made available to the Revenue Service representatives copies of the daily records (i.e., the disputed records) that had been taken from the clinic in the January 3, 1964 raid. The parties have stipulated that these daily records, together with leads derived therefrom, are the sole basis for respondent's determination contained in the statutory notice of deficiency for 1963 and 1964.

The Internal Revenue Service investigation was instituted by the Revenue Service's Intelligence Division. The revenue agent's report in this case was made by Agent John Mierow, who first obtained knowledge of the raid on the clinic two or three days later from the newspapers or news media.

In May of 1964, Efrain's motion to suppress certain evidence taken at the raid was heard and denied by the Criminal Court of Record in and for Dade County, Florida.

Efrain's criminal case was tried in the said court in January of 1965. The jury returned a verdict of guilty on two counts of the Information against Efrain, charging conspiracy to commit abortion and attempted abortion. He then took an appeal to the Third District Court of Appeals of the State of Florida. That court affirmed the attempted abortion conviction. See Rodriguez v. State, 189 So. 2d 636 (Fla. 1966).

In June of 1966, Efrain filed a petition for a writ of certiorari in the Supreme Court of the State of Florida. On February 14, 1967, that court denied the petition for lack of jurisdiction.

A petition for a writ of certiorari was filed in the Supreme Court of the United States in its October 1967 term. That petition was denied.

On May 2, 1968, a petition for a writ of habeas corpus was filed in the Supreme Court of Florida on Efrain's behalf, which petition was subsequently denied.

A petition for a writ of habeas corpus was filed and granted by the United States District Court for the Southern District of Florida in August, 1969. The District Court observed that the raiding officers announced only their identity and not their purpose when they broke into the Ayala Clinic. The court's order states "that no exigency existed which excused the making of the other half of the [constitutionally required] announcement" and that "the entry of the officers into the clinic was illegal and the motion to suppress the evidence obtained thereafter should have been

[5] Barton saw her name on one page of these disputed records, but she could not recall whether it was before or after the raid.

[6] During the course of this search, the raiding officers observed that windows and doors in the clinic were covered with aluminum foil or film.

granted." The court concluded that the finding of the state court was not fairly supported by the record and ordered "that the judgment of conviction be vacated and a new trial granted to the petitioner within a reasonable time or the petitioner set free."

Subsequent to the order of the Federal District Court, the Criminal Court of Record of Dade County, Florida, ordered on May 22, 1970, "that the State of Florida, its attorneys, investigators, agents, agencies, and representatives, and any parties in privity with any of them, be and they shall forthwith return to the within Defendant, EFRAIN T. SUAREZ, * * * all books, records, papers, documents and other items seized, and any and all copies of the same * * *."

On January 8, 1968, the petitioners filed a motion in this Court, requesting that affirmative allegations of the respondent's amended answer be stricken and that judgment on the pleadings be entered. On May 20, 1968, the respondent moved to continue a hearing on the motion on the grounds that it was premature because of pending collateral attacks on Efrain's conviction. The continuance was granted. By joint motion of the parties, two additional continuances were granted. The trial of the case was then set for June 8, 1970.

On June 5, 1970, Judge Mehrtens, United States District Court Judge, Southern District of Florida, issued a Temporary Restraining Order prohibiting the Internal Revenue Service from using the records seized in the raid on the clinic in any criminal or civil proceeding; this was done for the purpose of holding the problem in status quo until a full hearing could be held on the matter.

On June 8, 1970, when this case was called from the trial calendar at Miami, hearing on all pending motions was set for June 12, 1970, to be followed by trial thereafter.

On June 11, 1970, a full hearing was held in the United States District Court at which Judge Mehrtens dissolved the Temporary Restraining Order against the Internal Revenue Service "because the plaintiffs have an adequate remedy at law in the Tax Court."

Petitioners' motions filed in this case were heard on June 12, 1970. The motions are as follows:

1. Motion to Strike the Affirmative Allegations of the Amended Answer and Judgment on the Pleadings;

2. Motion to Strike and Suppress Evidence and to Quash Subpoenas and Subpoenas Duces Tecum;[7]

3. Motion to Quash the Statutory Notice of Deficiency and to Dismiss for Lack of Jurisdiction;

4. Motion to Return Property; and

5. Motion to Shift Burden of Proof.[8]

After testimony was taken and other evidence was admitted, the motions were taken under advisement and briefs were ordered to be filed.

In his Motion to Strike the Affirmative Allegations of the Amended Answer and Judgment on the Pleadings, Efrain points out the respondent's admission in his amended answer that the deficiencies in income taxes determined against Efrain for the years 1963 and 1964 were based upon information and leads obtained from records seized in a raid on January 3, 1964. Efrain contends that the said records were taken from him in a search and seizure which violated his constitutional rights. Efrain moves that the affirmative allegations made in the respondent's amended answer (based on information and leads from the said records) be stricken and that the Court hold for petitioners on the pleadings.

In his Motion to Strike and Suppress Evidence and to Quash Subpoenas and Subpoenas Duces Tecum, Efrain states that the respondent based his determination in the statutory notice upon evidence which was taken from Efrain in a search and seizure which violated his constitutional rights, and the motion maintains:

> Evidence to be submitted by the Internal Revenue Service at the trial based solely upon the fruits of an illegal search and seizure should be suppressed and all Subpoenas directed to individuals (unknown to Petitioners) ascertained from leads obtained in said search should be quashed.

In his Motion to Quash the Statutory Notice of Deficiency and to Dismiss for Lack of Jurisdiction, Efrain states that

[7] We are not considering herein a similar motion filed by Stanley J. Bartel, Esquire, which the parties stipulated would be heard, if necessary, when the trial resumes.
[8] Our discussion herein will be limited to the constitutional grounds stated in the motion.

the respondent based his determination in the statutory notice upon evidence which was taken from Efrain in a search and seizure which violated his constitutional rights and that the statutory notice is therefore a direct product of such evidence and leads obtained therefrom. Efrain moves that the notice be quashed and stricken and that the Court thereupon dismiss this cause for lack of jurisdiction.

In his Motion to Return Property, Efrain states that the respondent based his determination in the statutory notice upon copies of records which were taken from Efrain in a search and seizure which violated his constitutional rights. Efrain states that he has made demand upon officials of the Internal Revenue Service to return the copies in their possession, and he moves that the Court order their return.

In his Motion to Shift the Burden of Proof, Efrain states that the respondent based his determination in the statutory notice upon evidence which was taken from Efrain in a search and seizure which violated his constitutional rights. Efrain concludes that the statutory notice thereby has lost its presumption of correctness, and he moves that the Court hold the respondent has the burden of proof to establish allegations in the notice.

OPINION

We are confronted herein with an important and fundamental question: To what extent are the prohibitions against unreasonable searches and seizures enunciated in the Fourth Amendment to the United States Constitution applicable in a civil tax proceeding? It is a significant question and one of first impression in this Court.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It has been clearly established that evidence seized in violation of a defendant's rights under the Fourth Amendment (or under the Fourteenth Amendment, where the states are involved) will be excluded in a criminal trial, whether that trial be in a state or Federal court and whether the evidence was seized by Federal or state officials. Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960); Weeks v. United States, 232 U.S. 383 (1914). This exclusionary rule bars not only the evidence itself but all leads obtained therefrom, Silverthorne Lumber Co. v. United States, 251 U.S. 385 [3 AFTR 3016] (1920), and it applies to exclude evidence illegally obtained by state officials and made available to Federal officials, Elkins v. United States, supra.

The Supreme Court has applied the exclusionary rule in civil proceedings which had criminal overtones or involved forfeitures. See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); Boyd v. United States, 116 U.S. 616 [3 AFTR 2488] (1886).

Thus far, the high court has not faced the exact issue presented herein. But it has repeatedly stated that the rule's purpose is to deter unconstitutional conduct, and its prior opinions, as well as decisions by other Federal courts, clearly delineate the path we should follow. Thus, in Weeks v. United States, supra, the Court, in commenting on the scope of protection afforded by the Fourth Amendment, stated (232 U.S. at 392):

> This protection reaches all alike, *whether accused of crime or not*, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. [Emphasis added.]

In Silverthorne Lumber Co. v. United States, supra, a criminal case extending the protection of the Amendment to a corporation, the Court stated (251 U.S. at 392):

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that *it shall not be used at all.* [Emphasis added.]

Subsequently, the Court, in Elkins v. United States, supra, noted (364 U.S. at 217):

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.

And in Camara v. Municipal Court, supra, which involved a warrantless

search pursuant to the San Francisco Housing Code, the Court said (387 U.S. at 530):

> [W]e cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely "peripheral." It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. [Footnote omitted.]

The foregoing statements are a reflection of the view stated for the Court by Mr. Justice Butler some 40 years ago, that

> [t]he Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. [See Go-Bart Co. v. United States, 282 U.S. 344, 357 (1931).]

The Court of Appeals for the Second Circuit faced the question of the Fourth Amendment's applicability in a civil tax case in Pizzarello v. United States, 408 F.2d 579 [23 AFTR 2d 69-1575] (C.A. 2, 1969). That case involved a taxpayer's action to enjoin a levy of a jeopardy assessment for unpaid wagering taxes on money illegally seized by the Government. In reversing an order of the district court denying the injunction, the court said (at 588):

> This case, however, while civil in nature is not between private parties and there are no analogous independent deterrents to, or remedies against, government violations of the Fourth Amendment. The prohibition against unreasonable searches and seizures is directed at governmental action. Absent an exclusionary rule, the Government would be free to undertake unreasonable searches and seizures in all civil cases without the possibility of unfavorable consequences. In such a situation, while the matter has not been settled by Supreme Court decision, it seems clear, even under a view of the law most favorable to the Government, that evidence so obtained would be excluded. Because Pizzarello's tax assessment was based in substantial part, if not completely, on illegally procured evidence, the assessment is invalid.

In United States v. Blank, 261 F. Supp. 130 (N.D. Ohio, 1966), the district court applied the Fourth Amendment exclusionary rule and directed that illegally seized evidence be destroyed (contraband) or returned (noncontraband) to a taxpayer who was threatened with a tax assessment. In so holding, it reasoned (at 182):

> Where, as here, there is a correlative civil action open to the Government which imposes a penalty upon the citizen commensurate with the criminal sanctions to which an accused, victimized by an illegal search, would be exposed, then we see no distinguishable difference between the two forms of punishment which excuses the government from complying with constitutional mandates when prosecuting their action in a civil forum.
> • • •

See also the dissenting opinion of Mr. Justice Brennan in Abel v. United States, 362 U.S. 217, 254-256 (1960).

Other Federal courts have indicated similar views. Knoll Associates, Inc. v. F.T.C. 397 F.2d 530 (C.A. 7, 1968) (stolen documents could not be used by the Government in an FTC proceeding); Powell v. Zuckert, 366 F.2d 634 (C.A. D.C. 1966) (discharge of a Government civilian employee); Berkowitz v. United States, 340 F.2d 168 (C.A. 1, 1965) (forfeiture); District of Columbia v. Little, 178 F.2d 13 (C.A. D.C. 1949), affirmed on other grounds, 339 U.S. 1 (1950) (housing code violation); United States v. Butler, 156 F.2d 897, (C.A. 10, 1946) (forfeiture); United States v. Physic, 175 F.2d 338 [38 AFTR 73] (C.A. 2, 1949) (forfeiture); Walker v. United States, 125 F.2d 395 (C.A. 5, 1942) (forfeiture); Rogers v. United States, 97 F.2d 691 (C.A. 1, 1938) (civil action to recover import duties); Laprease v. Raymours Furniture Company, 315 F.Supp. 715 (N.D. N.Y. 1970) (action to enjoin a replevin); States of Iowa v. Union Asphalt & Roadoils, Inc., 281 F.Supp. 391 (S.D. Iowa 1968) affirmed sub nom. Standard Oil Company v. State of Iowa, 403 F.2d 1171 (C.A. 8, 1969) (treble damage antitrust action); United States v. Stonehill, 274 F.Supp. 420 [21 AFTR 2d 358] (S.D. Cal. 1967), affd. 405 F.2d 738 [23 AFTR 2d 69-339] (C.A. 9, 1968) (enforcement of tax lien); Lord v. Kelley, 223 F.Supp. 684 [13 AFTR 2d 935] (D. Mass. 1963) (action to enjoin evidentiary use of illegally seized records); United States v. One 1963 Cadillac Hard-

top, 220 F.Supp. 811 (E.D. Wis. 1963) (forfeiture); Lassoff v. Gray, 207 F.Supp. 843 [10 AFTR 2d 6357] (W.D. Ky. 1962) (action to enjoin tax assessment); United States v. $4,171.00 in United States Currency, 200 F.Supp. 28 (N.D. Ill. 1961) (forfeiture); United States v. Costello, 145 F.Supp. 892 (S.D. N.Y. 1935), reversed on another issue, 247 F.2d 384 (C.A. 2, 1957) which was in turn reversed on such other issue, 356 U.S. 256 (1958) (denaturalization proceeding); Tovar v. Jarecki, 83 F.Supp. 47 [37 AFTR 1263] (N.D. Ill. 1948), reversed on other grounds, 173 F.2d 449 [37 AFTR 1133] (C.A. 7, 1949) (action to enjoin tax collection); Schenck v. Ward, 24 F. Supp. 778 (D. Mass. 1938) (immigration proceeding); Ex Parte Jackson, 263 F. 110 (D. Mont. 1920) (deportation proceeding). But cf. Walder v. United States, 347 U.S. 62 (1954) (use of illegally seized evidence for impeachment purposes in criminal proceeding); United States v. Schipani, 435 F.2d 26 [27 AFTR 2d 71-466] (C.A. 2, 1970) (use of wiretap evidence in sentencing); United States Ex Rel. Sperling v. Fitzpatrick, 426 F.2d 1161 (C.A. 2, 1970) (parole revocation proceeding); N.L.R.B. v. South Bay Daily Breeze, 415 F.2d 360 (C.A. 9, 1969), certiorari denied 397 U.S. 915 (1970) (labor proceeding); Compton v. United States, 334 F.2d 212 [14 AFTR 2d 5217] (C.A. 4, 1964) (impeachment purposes in tax assessment proceeding).

See also the annotation, "Admissibility In Civil Case, of Evidence Obtained by Unlawful Search and Seizure," 5 A.L.R. 3d 670, 678-683, and the 1971 Supplement to 5 A.L.R. 3d at pages 13-14.

In United States v. Chase, a 1966 opinion of the District Court for the District of Columbia, unofficially reported at 67-1 USTC par. 15,733, the court stated:

> It is clear that the protections of the Fourth Amendment against unreasonable search and seizure are not strictly bounded by the confines of the criminal law, but extend to certain civil proceedings. Boyd v. United States, 116 U.S. 616 [3 AFTR 2488] (1886); Berkowitz v. United States, 340 F.2d 158 (1st Cir. 1965); Lassoff v. Gray, 207 F.Supp. 843 [10 AFTR 2d 6357] (W.D. Ky. 1962), and cases cited at pp. 846-848. [Footnote omitted.] See also Annotation, "Admissibility in Civil Case of Evidence Obtained by Unlawful Search and Seizure," 5 ALR 3d 670, 678-83 (1966).
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> There is no question here but that the basis for the Government's tax assessment against Joseph Chase is evidence which it obtained in violation of the Fourth Amendment to the Constitution. There appears to be no sound reason to accord less consideration to ". . . the imperative of judicial integrity" in this proceeding than in the criminal case involving the same parties. The role of "accomplice . . . in the wilful disobedience of law" is an unbecoming one for a Federal court—regardless of the nature of the proceedings. See Elkins v. Unted States, • • • 364 U.S. at 223, citing McNabb v. United States, 318 U.S. 332 at 345 (1943).

In Chase, the District Court held that a tax assessment based on illegally seized material was not admissible in evidence in a suit brought by the Government to reduce the assessment to a judgment.

We are not unmindful of the competing considerations involved in applying the protection of the Fourth Amendment. See Amsterdam, "Search, Seizure, and Section 2233: A Comment," 112 U. of Pa. L. Rev. 378, 388-389 (1964).[9] But, the language of the Fourth Amendment itself admits of no distinction between searches and seizures in the context of a criminal case and those made in the context of a civil case. Indeed, it speaks in terms of the proscribed conduct without any apparent regard to the motivation for such conduct or the use of the fruits thereof. Consequently our recent decisions, dealing with the inapplicability of the inhibitions of the Fifth Amendment to civil tax proceedings, are distinguish-

[9] [I]t will not do to forget that the Weeks rule is a rule arrived at only on the nicest balance of competing considerations and in view of the necessity of finding some effective judicial sanction to preserve the Constitution's search and seizure guarantees. The rule is unsupportable as reparation or compensatory dispensation to the injured criminal; its sole rational justification is the experience of its indispensability in "exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part of federal law-enforcing officers." As it serves this function, the rule is a needed, but grudingly [sic] taken, medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter the constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest as declared by Congress. [Footnotes omitted.]

able. Hugo Romanelli, 54 T.C. 1443 (1970), on appeal (C.A. 7, Aug. 11, 1970); John Harper, 54 T.C. 1121 (1970).[10]

The costs to society of applying the exclusionary rule in civil tax cases are substantially less than in the criminal area where the rule is well established. Surely the lesser objective of civil tax collection should not be accorded preferential treatment over the greater objective of convicting the guilty criminal. Moreover, we cannot ignore the additional factor that the integrity of the judicial process is also at stake. See Mapp v. Ohio, supra, 367 U.S. at 659, 660 (1961); Elkins v. United States, supra, 364 U.S. at 222 (1960).

In view of the foregoing, we conclude that any competing considerations based upon the need for effective enforcement of civil tax liabilities (compare Elkins v. United States, supra, 364 U.S. at 222) must give way to the higher goal of protection of the individual and the necessity for preserving confidence in, rather than encouraging contempt for, the processes of Government. See Mapp v. Ohio, supra, 367 U.S. at 659, and Elkins v. United States, supra, 364 U.S. at 223, where the Supreme Court quoted with approval the following from the dissenting opinion of Mr. Justice Brandeis in Olmsted v. United States, supra, 277 U.S. at 485:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. * * * If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

We hold that, as a matter of law, the protective rule of the Fourth Amendment which excludes evidence illegally obtained is applicable in a civil tax case.

We must now consider whether the action taken by the Federal District Court for the Southern District of Florida in the habeas corpus proceeding, discussed in our findings, should have a binding effect on the determination to be made herein regarding the constitutionality of the raid.

Efrain argues that the United States is in privity with the State of Florida and is barred by the principle of collateral estoppel from relitigating the search and seizure issue.[11] We cannot accept this argument. In order for the principle of collateral estoppel to apply, it is essential that there be a preceding final determination by a court, resolving the matter at issue in the present litigation. In Commissioner v. Sunnen, 333 U.S. 591 [36 AFTR 611] (1948), this requirement was discussed as follows (at 597-598):

> The rule [*res judicata*] provides that when a court of competent jurisdiction has *entered a final judgment on the merits* of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * The *judgment* puts an end to the cause of action, which cannot again be

[10] The Fifth Amendment provides that "no person * * * shall be compelled in any *criminal* case to be a witness against himself * * *." [Emphasis added.]

[11] On the question of collateral estoppel and privity, see, generally, Commissioner v. Sunnen, 330 U.S. 591 (1948); Stephen Estates v. United States, 343 U.S. 907 (1951); and Leslie v. Commissioner, 226 F. 2d 695 [48 AFTR 210] (C.A. 7, 1955), affirming 23 T.C. 112 (1954). See also 46 Am Jur 2d, Judgments, sections 415, 513 and 519.

It seems doubtful to us that the United States and the State of Florida can be considered as privies. No Federal agent or employee participated in the raid, and the Federal Government was not a party to any of the prior criminal litigation. The State of Florida did not represent the interests of the United States in the prior litigation, and the United States did not control or influence the manner in which the State pursued that litigation. The United States had no right to introduce testimony, cross-examine witnesses, or appeal the judgment. While officials of the *same* government may be in privity, we doubt it can be said that officials of *different* governments are privies unless that fact is clearly established by the evidence. Cf. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402-403 [24 AFTR 956] (1940); Tait v. Western Maryland Railway Co., 289 U.S. 620, 627 [12 AFTR 59] (1933); and Guaranty State Bank of Greenville, Tex., 12 B.T.A. 542 (1928).

Efrain maintains that the respondent, in earlier hearings before this Court, indicated that he believed the doctrine of collateral estoppel would apply. However, the applicability of the doctrine is dependent upon legal principles and not upon the consistency of the respondent's contentions. We have not been shown how Efrain was put to any disadvantage.

brought into litigation between the parties upon any ground whatever absent fraud or some other factor invalidating the judgment. * * *

* * * * * * * * *

But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, *upon the determination of which the finding or verdict was rendered.*" * * * [M]atters which were actually litigated and *determined* in the first proceeding cannot later be relitigated. * * * In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment or collateral estoppel. * * * [Citations omitted. Emphasis added.]

We do not agree with Efrain that the District Court made a determination that the raiding officers acted in an unconstitutional manner when they broke into the Ayala Clinic and that this determination is binding on all courts and on all parties.

The District Court order on its face states that it is based on 28 U.S.C. section 2254 (d)(8) and that "the presumption of the correctness of the state court finding stands unless it is not fairly supported by the record * * *." The District Court concluded that the finding by the state court was *not* fairly supported by the record and ordered that a new trial be granted.

Accordingly, it is evident that the District Court order (despite its strong language quoted in our findings) was not a final and binding determination of the constitutionality of the raid.[12] It left open the opportunity for the development of another record on the issue of whether the evidence was illegally seized.

We hold that the District Court order in the prior habeas corpus proceeding does not dictate the determination to be made herein. As a Federal court, we shall make "an independent inquiry" in applying Federal law in order to ascertain "whether there has been an unreasonable search and seizure by state officers." Elkins v. United States, supra, 364 U.S. at 223-224.

The critical question before us in this case is whether the raid on the Ayala Clinic on January 3, 1964, resulted in a search and seizure which violated Efrain's rights under the Fourth Amendment to the Constitution.[13]

The parties are in agreement that, in making their forcible entry into the clinic on the day of the raid, the raiding officers made no announcement relating to the purpose for which they sought entry. The parties are further in accord that (1) an announcement as to purpose is required under the Fourth Amendment (with certain exceptions) regardless of whether the raiding officers are armed with a search warrant, and (2) in the absence of such an announcement, any arrest or search and seizure of property made during a raid are in violation of rights granted under that Amendment. See Ker v. California, 374 U.S. 23 (1963) at 37-41 (opinion of Clark, J.) and at 46-47 and 54-64 (opinion of Brennan, J.); Sabbath v. United States, 391 U.S. 585 (1968); and Miller v. United States, 357 U.S. 301 (1958). The Florida Supreme Court has recognized the common law origins of this requirement. See Benefield v. State of Florida, 160 So. 2d 706 (Fla. 1964).

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[12] At a subsequent hearing on June 11, 1970, Judge Mehrtens, who issued the habeas corpus order, stated:

The effect of that order, in my opinion, would not have foreclosed the State, for example, from coming in on a retrial of the case and introducing [additional factors] into evidence * * *. * * * I had no intention of trying to stop them.

* * * * * * * * * * * * * * * * * * *

You see, * * * what you are arguing is the effect of my holding was that that was an illegal search and seizure under any or all possible circumstances and that there was no way that anybody could make it legal. And I didn't hold that. * * *

[13] Efrain also argues, without being specific, that the raiding officers violated his rights under the Fifth Amendment to the Constitution. We have held that in a purely civil tax proceeding in the Tax Court, we are unable to consider the merits of arguments based on alleged violations of Fifth Amendment guarantees. Hugo Romanelli, 54 T.C. 1443 (1970, on appeal (C.A. 7, Aug. 11, 1970); John Harper, 54 T.C. 1121 (1970); see also A. H. Alexander, 56 T.C. 710 (1971). However, Efrain suggests that the Court of Appeals for the Fifth Circuit, to which the instant case would be appealable, has adopted a different view. Because of the holding herein as to the applicability of Fourth Amendment protections, we need not discuss this question.

See also Florida Statutes Annotated, section 901.19.

It is therefore clear that, unless the officers in the instant case were for some reason excused from making an announcement as to the purpose for the raid, the records at issue herein were obtained as the result of an unreasonable search and seizure.

It is recognized in the authorities which we have cited above that an announcement as to purpose is not required in all instances, and that there are exceptions to the general rule. When the criminal case arising out of the raid was presented on appeal in the Florida courts, it was held that the officers' fear for Barbara's safety excused their failure to announce their purpose. See Rodriguez v. Florida, 189 So. 2d 656, 660 (3rd Fla. App. 1966). However, we do not agree that the evidence before us supports the officers' contention that their fears for Barbara's well-being began to increase rapidly following their first knock on the inside door of the clinic and that, as a result, they could legally enter the clinic without the requisite announcement.

The respondent admits that there was no direct evidence relating to this question in the earlier state court trial. At the hearing before this Court, therefore, an attempt was made by the respondent to elicit testimony on this point. The testimony did not add much of substance to the record in the state court trial, and in any event, we found it to be less than convincing.[14]

What the record shows is that, after the raiding officers received no response to their first set of knocks and allegedly were becoming more and more anxious, they knocked again. This evidence does not square with a finding that the officers feared for Barbara's safety. If they in fact seriously entertained such a fear, it seems unlikely that they would have bothered with repeated knocking. Cf. United States v. Barrow, 212 F. Supp. 837, 847 (E.D. Pa. 1962).

There is no doubt that the raid was well planned and that the raiding officers knew well in advance the situation into which Barbara would be placed pursuant to their plan. They also knew that before any medical procedure could be commenced and before any needle would be administered, Barbara, an experienced and trained policewoman, would make an arrest. This, too, was part of their plan. We do not believe that the raiding officers intended to place Barbara in a dangerous situation, and we do not believe that the officers, in following their plan on the day of the raid, in fact placed her in a position of jeopardy. We seriously question whether the officers entertained a contrary belief.

We do not regard as credible the testimony of the raiding officers who allegedly had increasing fear for Barbara's safety and suddenly decided Barbara needed to be rescued. Clearly they had ample time within which to make the requisite announcement as to purpose since they delayed from 15 to 30 seconds before breaking the door down. We conclude that Barbara was not in any real peril and that the members of the raiding party in failing to announce their purpose, were not motivated by a concern for her well-being; no exigency existed which excused the raiding party from making the other half of the constitutionally required announcement after they identified themselves at the clinic door.

The respondent further argues that the raiding party did not have to make an announcement as to purpose because Efrain knew their purpose and, therefore, such an announcement would have been a useless gesture.[15] He cites Wayne v. United States, 318 F.2d 205 (C.A. D.C. 1963). The respondent's argument in this respect appears to be in the nature of an afterthought, developed at some time subsequent to the raid. The argument does not appear to have been made in any of the prior proceedings arising out of the raid.

In Ker v. California, supra, a case also involving an unannounced entry, Mr.

[14] We do not accord much weight to unsupported testimony, offered for the first time at the hearing in the instant matter, relating to statements made by unidentified informants as to alleged unprofessional conduct by Efrain in treating his patients.

[15] The respondent also suggests that the clinic was soundproofed and that the announcement of purpose could not be heard inside. This fact has not been established by the record. Nevertheless, we are unable to find that the officers actually believed the clinic was soundproofed; if they did, they would not have even bothered to announce their identity.



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Justice Clark discussed whether there were grounds for the police to believe that a suspect was expecting them. He stated (374 U.S. at 40, footnote 12):

> It goes without saying that in determining the lawfulness of entry * * * we may concern ourselves only with what the officers had reason to believe *at the time of their entry*. Johnson v. United States, 333 U.S. 10, 17 (1948).

Mr. Justice Clark further pointed out that a search does not change its character from "what is subsequently dug up."

The respondent contends that, from an examination of the circumstances of this case, it is reasonable to conclude that Efrain knew why the officers were there. Even if the record were to establish that Efrain knew why the officers were there (and we do not agree that it does), we would not be able to hold that the officers were excused from announcing their purpose unless the record also established that the members of the raiding party *believed* Efrain knew their purpose and for that reason decided not to make an announcement. Cf. Ker v. California, supra. There is no direct evidence on this question.

Our careful examination of the entire record leads us to conclude that the officers entertained no such belief.[16] If they did, it is very difficult to see why the extensive materials in the record before us are devoid of a single reference to such a significant fact and why the "useless gesture" issue was not raised during any of the prior criminal proceedings. We are forced to conclude, as we observed above, that this argument comes to us as an afterthought and not as an accurate reflection of the facts as they existed at the time of the raid.

We hold that the members of the raiding party improperly failed to make an announcement as to purpose.

The raiding officers further violated Efrain's rights under the Fourth Amendment by virtue of their failure to obtain arrest and search warrants.

The parties are in agreement that, if Efrain was validly arrested, a warrantless search and seizure, with some limitations, could properly follow such arrest. United States v. Rabinowitz, 339 U.S. 56, 60 (1950).[17] If Efrain was not the subject of a valid arrest then it was essential under the Fourth Amendment for the officers to obtain warrants in order to conduct a lawful search, especially in view of the fact that the raid was in the planning for several weeks and there was ample opportunity to secure the warrants.[18]

Trupiano v. United States, 334 U.S. 699 (1948).[19]

We hold that Efrain's arrest was *not* lawful because it was made without a warrant. The respondent insists that no warrant was needed to effect a valid arrest. In support of this position, he argues that a felony was committed in the very presence of one of the members of the raiding party. The respondent further argues that all of the arresting officers had probable cause to believe a felony was being committed in their presence. See United States v. Rabinowitz, supra, 339 U.S. at 60 and 65. As will be seen from the discussion which follows, we do not agree that the members of the raiding party were justified in making a warrantless arrest.

In his reply brief, the respondent contends that Efrain's arrest was lawful

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[16] It is interesting to note that the respondent, on brief, has suggested the evidence can indicate that the police had reasonable justification to believe Efrain did not even hear them. See footnote 15, supra.

[17] Only a "reasonable" search is permissible. On the question of the scope of a "reasonable" search, Rabinowitz was overruled in Chimel v. California, 395 U.S. 752 (1969). Chimel, however, does not have retroactive application. Williams v. United States, 401 U.S. 646 (1971). We do not reach the question herein of the scope of the search because of our holding that Efrain's arrest was invalid without a warrant.

[18] It is readily apparent from the record that the planning for the raid began as early as November, 1953; that the police conducted an investigation for four to six weeks prior to the raid; that Efrain was "known" to the raiding officers as an alleged abortionist from their prior investigations; that the raiding officers knew that Efrain was using the Ayala Clinic; that the state officials had affidavits and other information from individuals alleging that abortions had occurred in the clinic; and that Barbara Williams had made an appointment for an abortion at the clinic. Doubtless, these factors would have constituted probable cause for the securing of an arrest warrant for Efrain and others in the clinic and for the securing of a search warrant relating to the premises of the clinic. Carroll v. United States, 267 U.S. 132, 162 (1925); Wong Sun v. United States, 371 U.S. 471, 479 (1963).

[19] Trupiano was overruled in Rabinowitz only to the extent it related to searches conducted after valid arrests.

because he committed a felony in the presence of Myrtle Ellison, one of the raiding officers. It is a "well established right of law enforcement officers to arrest without a warrant for a felony committed in their presence * * *." Trupiano v. United States, supra, 334 U.S. at 704. However, the respondent does not indicate specifically what felony Myrtle witnessed.

Our findings indicate that she observed Efrain accept $1,000 from Barbara. We do not see (nor has the respondent attempted to show) how that action, by itself, constitutes a felony under Florida law. See Florida Statutes Annotated, sections 775.08[29] and 797.01.[31] In our view, the record does not even establish that Myrtle saw Efrain *attempt* to commit a felony. See Florida Statutes Annotated, section 776.04,[32] and compare Carter v. State, 155 So.2d 787 (Fla. 1963). And clearly, Myrtle did not see Efrain engaged in a conspiracy. See King v. State, 104 So.2d 730 (Fla. 1957), and Rodriguez v. State, supra.

With regard to whether the officers had probable cause to believe a felony was being committed in their presence, the respondent argues on brief:

> * * * [T]he raiding officers had no way to know positively in advance that petitioners would accept the marked $1,000 from Barbara Williams until Mrs. [Myrtle] Ellison so advized them immediately before knocking on the door. However, at the moment of their knocking and announcement of their identity, they had reasonable belief that a felony was being committed inside the clinic by virtue of their knowledge that the marked money had been accepted and that petitioner had agreed to perform the abortion, combined with other knowledge from affidavits and from an informer. * * *

We cannot agree that the officers had probable cause to believe that a felony was being committed in their presence once they knew that Efrain had accepted the $1,000. They were aware (because it was part of their plan) that Barbara would not permit Efrain to commence any medical procedure relating to her "abortion." They were also aware that Barbara was not even pregnant. It is likely that if they had probable cause to believe anything, it was that Efrain was *not* committing any felonious act. We fail to see how knowledge of the acceptance of the $1,000, even if combined with their other knowledge, caused the members of the raiding party to believe that, at the moment of their entry, Efrain was engaged in the commission of a felony.

Finally, the respondent argues that the raiding party's rising fears for Barbara's safety permitted them to enter the clinic without warrants for the purposes of rescue and thereafter to make arrests and to search for and seize items within the clinic. As we pointed out in our discussion above, we do not believe that the raiding officers developed any sudden concern for Barbara's well-being. They knew in advance the situation that would exist, and they had ample opportunity to obtain warrants. The position in which Barbara found herself was not only foreseeable by the raiding officers but was arranged by them. We do not believe that there were any surprise developments or any unexpected emergency which would ex-

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[29] Section 775.08 provides:
Any crime punishable by death, or imprisonment in the state prison, is a felony, and no other crime shall be so considered. Every other offense is a misdemeanor.

[31] Section 797.01 provides:
Whoever with intent to procure miscarriage of any woman unlawfully administers to her, or advises or prescribes for her, or causes to be taken by her, any poison, drug, medicine or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with like intent aids or assists therein, shall, if the woman does not die in consequence thereof, be punished by imprisonment in the state prison not exceeding seven years, or by fine not exceeding one thousand dollars.

[32] Section 776.04 provides: Whoever attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such an offense, but fails in the perpetration, or is intercepted or prevented in the execution of the same, shall, when no express provision is made by law for the punishment of such attempt, be punished as follows:

* * * * * * * * * * * * * * * * * * *

(2) If the offense attempted to be committed is punishable by imprisonment in the state prison for life, or for five years or more, the person convicted of such attempt shall be punished by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year.

* * * * * * * * * * * * * * * * * * *

cuse their forcible entry into the clinic without the requisite warrants. In any event, it seems doubtful to us that the placing of a raiding officer, pursuant to a prearranged plan, in a position of alleged jeopardy can serve to negate constitutional requirements. "If * * * there was a semblance of emergency requiring the breaking of the door, it was created by the officers." Accarino v. United States, 179 F.2d 456, 464 (C.A. D.C., 1949); McKnight v. United States, 183 F.2d 977, 978 (C.A. D.C., 1950). Accordingly, we conclude that the Miami and Florida authorities were not excused from the securing of warrants because of any necessity to rescue Barbara."[13]

In view of the fact that the officers failed to obtain warrants and failed to announce their purpose, we hold that the disputed records, upon which the respondent has based his determination, were taken from Efrain as the result of an unreasonable search and seizure in violation of the provisions of the Fourth Amendment.

We must now consider what effect the conclusions we have reached herein have on respondent's determination in the statutory notice in this case.

As we have already noted, the parties have stipulated that the determination here is based entirely upon the items seized by the Florida and Miami officials in their raid on the clinic and leads derived therefrom. Because of our conclusion that this evidence is subject to the exclusionary rule developed under the Fourth Amendment, we must consider Efrain's argument that the statutory notice is illegal and void, or in the alternative, that it loses its presumption of correctness.

The respondent contends that the notice is valid because it satisfies the requirements of section 6212(a) and (b) of the 1954 Code and because it is not proper for this Court to go behind the statutory notice to examine the facts or circumstances upon which its determinations are based.[14]

As a general rule, this Court will not look behind a deficiency notice to examine the evidence used or the propriety of the respondent's motives or of his administrative policy or procedure in making his determinations.

Estate of David Smith, 57 T.C. 650, 656 (1972); Arthur Figueiredo, 54 T.C. 1508, 1513 (1970), on appeal (C.A. 9, Oct. 14, 1970); Philip F. Flynn, 40 T.C. 770, 772 (1963); Charles Crowther, 28 T.C. 1293, 1301 (1957) aff'd 269 F.2d 292 [4 AFTR 2d 5295] (C.A. 9, 1959); H. F. Kerr, 5 B.T.A. 1073, 1095 (1927). As we observed in Terry C. Rosano, 46 T.C. 681, 687 (1966), "the Commissioner's determinations may often rest upon hearsay or other inadmissible evidence, and we know of no rule of law calling for a review of the materials that were before the Commissioner in order to ascertain whether he relied upon improper evidence * * *."

We regard the general rule enunciated in the cases cited above as sound. In reality, we are not called upon to depart from that principle in the instant case in view of the fact that the respondent has admitted by stipulation the nature of the evidence upon which he relied in preparing his statutory notice.

We are not simply confronted herein with a case in which the respondent based his determination on evidence which is inadmissible under the usual rules of evidence, e.g., hearsay. On the contrary, it must be emphasized that the respondent, in preparing his statutory notice, relied solely on evidence which was illegally seized in violation of the provisions of the Fourth Amendment. We are therefore not dealing with a mere procedural rule of evidence. Cf. Kaufman v. United States, 394 U.S. 217, 222-225 (1968). In Estate of David Smith, supra, we stated (57 T.C. at 656):

> [I]t is well established that—*at least where unconstitutional conduct is not involved*—the courts will not inquire into the administrative policies and procedures employed by the respondent prior to making his determination. * * * [Emphasis added.]

Where infringements of constitutional rights are involved, we are con-

[13] Under Florida Statutes Annotated, section 901.20, a peace officer may break into a building to liberate a person who entered to make an arrest. The statute does not apply in this case because the officers did not break into the clinic to "liberate" Barbara; they entered the clinic to make an arrest. Furthermore, it is obvious that the provision cannot be regarded as superseding the dictates of the Fourth Amendment. Ker v. California, 374 U.S. at 38.

[14] The respondent points out that the provisions of the Tax Reform Act of 1969, establishing the United States Tax Court under Article I of the Constitution do not change the applicable legal principles. See Section 961 of the Tax Reform Act of 1969.

vinced that the determination in a statutory notice should be carefully scrutinized and that some sanction should be imposed to discourage the Commissioner's use of and reliance on constitutionally inadmissible evidence.

We are unable to agree, however, with the suggestion that the statutory notice here must be declared a nullity. We find no authority for this conclusion. On the contrary, Helvering v. Taylor, 293 U.S. 507 [14 AFTR 1194] (1935), teaches that when a petitioner makes a showing casting doubt on the validity of a deficiency determination, the statutory notice itself is not rendered void; the result of such showing is that the respondent must then come forward with evidence to establish the existence and amount of any deficiency. See also Federal National Bank of Shawnee, 16 T.C. 54, 63-64 (1951).

We are also unable to agree with petitioners' argument that the burden of proof in the case should be shifted to respondent. In situations where illegally obtained evidence has appeared, the courts have done no more than place the burden on the prosecutor to cleanse the evidence. Alderman v. United States, 394 U.S. 165, 183 (1969); United States v. Wade, 388 U.S. 218, 240 (1967); Nardone v. United States, 308 U.S. 338, 341 (1939); Baker v. United States, 430 F. 2d 499 [26 AFTR 2d 70-5293] (C.A.D.C., 1970); United States v. Coplon, 185 F.2d 629, 635 (C.A. 2, 1950). See also United States v. Blue, 384 U.S. 251, 255 [17 AFTR 2d 1032] (1966).

However, in the realm of the criminal law, where the exclusionary rule was born, suppression of tainted evidence serves as an effective disincentive to its use by the Government because the Government has the burden of proof. Clearly such disincentive does not exist in a civil tax case if the sole action taken is to suppress such evidence and the burden of proof and of going forward with the evidence remains on the taxpayer. We therefore conclude that in addition to suppression of the tainted evidence here we must also take further action.

We believe the respondent has a duty in the case at bar not only to cleanse the evidence but also, if he wishes to be sustained in his determination herein, to present evidence to support it which is free of unconstitutional taint.

We therefore conclude and hold that the determination before us, based entirely on constitutionally inadmissible evidence, carries no presumption of correctness. Because the presumption of correctness has disappeared, the respondent now has the burden of going forward with the proof to establish the existence of a deficiency with independent evidence, separate and apart from the tainted evidence. See Federal National Bank of Shawnee, supra.

In accordance with the foregoing discussion, an order will be entered by the Court in which we will take the following action with regard to the motions Efrain has filed with the Court.

(1) Motion to Strike the Affirmative Allegations of the Amended Answer and Judgment on the Pleadings: Grant that portion of the motion which relates to striking affirmative allegations in the amended answer and *deny* that portion of the motion which relates to judgment on the pleadings. Because the burden of going forward with proof in this case has been shifted to the respondent, who must now produce evidence which is not the fruit of an illegal search and seizure, the respondent shall have leave to file a further amended answer containing a statement of any facts upon which he will rely at trial to sustain his asserted deficiency.

(2) Motion to Strike and Suppress Evidence and to Quash Subpoenas and Subpoenas Duces Tecum: Grant the motion.

(3) Motion to Quash the Statutory Notice of Deficiency and to Dismiss for Lack of Jurisdiction: *Deny* the motion.

(4) Motion to Return Property: *Deny* the motion. We see no benefit inuring to Efrain from our ordering the respondent to return copies of the seized materials, and we see no harm coming to Efrain from our failure to do so. The originals of the disputed records were ordered returned to him by the Criminal Court of Record on May 22, 1970. Furthermore, we note that the respondent's copies were not obtained from Efrain.

(5) Motion to Shift Burden of Proof: *Deny* the motion, but order that since the presumption of correctness normally attaching to a determination by respondent of a deficiency in a statutory notice has been destroyed, the burden of producing and going forward with proof has shifted to respondent.

Reviewed by the Court.

*An appropriate order will be entered.*

DRENNEN, *J.*, concurring: I agree with the majority opinion up to the point where it discusses the procedural effect derived from the removal of the presumption of correctness of respondent's determination because it was founded on tainted evidence. Under the peculiar circumstances of this case, wherein it is stipulated that respondent's determination is based entirely on illegally obtained evidence, I think the majority is justified in holding that the burden of going forward has shifted to the respondent. Where such is not the case, however, and respondent may also have support for his determination of petitioners' taxable income with legally obtained evidence, I do not believe petitioner should be relieved of his burden of showing that his income tax returns are accurate even though he has been the victim of a constitutional violation. If petitioner establishes a prima facie case, respondent should then be required to prove his case with untainted evidence.

The majority does not hold that the notice of deficiency is invalid, even where it is based entirely on tainted evidence. If it were otherwise this Court would have no jurisdiction to proceed. John W. Heaberlin, 34 T.C. 58. Nor has the majority shifted the burden of proof with respect to the underlying deficiency to respondent, which it would be hard pressed to do under the law and the rules of this Court, absent some affirmative allegations by respondent. Petitioner filed a petition asking this Court to redetermine the correct amount of his tax liability. The Court would not be able to do this without some evidence concerning his correct taxable income. The presumption of correctness normally attaching to respondent's determination having been removed, the issue before the Court would be in equilibrium unless some evidence is presented. Petitioner, being the moving party, should provide sufficient evidence to make a prima facie case; otherwise his petition will fail from inertia. Unless the respondent has the burden of proof, I see little reason for him to move forward.

The dual need to protect the integrity of the Court's procedures and the need to discourage constitutional violations are both adequately met by removing the presumption of correctness of respondent's determination and by excluding the tainted evidence.

I cannot agree with the implications of Judge Simpson's dissenting opinion that the application of the exclusionary rule in civil tax cases will necessarily permit those engaged in illegal activities to avoid paying a tax on their income because a court determines that the police acted improperly in securing evidence. The Internal Revenue Service has a variety of methods for determining a taxpayer's taxable income without reliance on tainted evidence or the fruits thereof.

TANNENWALD, *J.*, concurring: I agree with the result which the majority reaches but deem it advisable to append certain observations along two principal lines.

First, I think it should clearly be understood that the majority opinion in no way impinges on the validity of respondent's deficiency notice as such. Section 6212 provides for the issuance of a notice of deficiency where the Commissioner determines that there is a deficiency in respect of certain taxes. Nowhere in the Code is there a provision which specifies the nature and quality of the evidence which the tax administrator must gather to support his determination. The absence of statutory guidelines suggests that Congress intended that the Internal Revenue Service should have great latitude in making determinations of liability.

Cases such as Helvering v. Taylor, 293 U.S. 507 [14 AFTR 1194] (1935), and its progeny, which encompass a holding that a determination is "arbitrary," "capricious," "excessive," or "invalid" are beside the point. A deficiency notice, supported by factually reliable, albeit illegally obtained, evidence is not properly subject to any of these characterizations. The troublesome aspects of illegally obtained evidence relate not to its lack of probative value but to the way it was acquired. Thus, the relevant inquiry, in a situation such as is involved herein, is directed to the limitations which should be imposed upon the respondent at the trial (including, but not limited to, the question of what evidence he may introduce) and not to an evaluation of his determination in light of the evidence upon which it is based.[1]

[1] Compare United States v. Blue, 384 U.S. 251 [17 AFTR 2d 1032] (1966), where defendant was charged criminally with attempting to evade income taxes. Blue challenged the validity of the indictment, claiming that he was compelled to incriminate himself due

This brings me to the second point. Illegal action in the context of a criminal investigation may enable the authorities to determine that someone has committed a crime. But, the prosecution has and must carry its burden of proof without the use of the fruits of law violations by public officials in order to obtain a conviction. Thus, as the majority opinion points out, in the realm of the criminal law where the exclusionary rule was born, the mere suppression of tainted evidence has been deemed an adequate and effective disincentive.

In a civil tax case, however, the knowledge that illegally obtained evidence will be inadmissible at trial may not be a sufficient disincentive due to the fact that the taxpayer, not the Commissioner, has the burden of proof. A large number of tax cases are decided almost exclusively on the basis of the taxpayer's failure to carry his burden. The majority opinion recognizes that fashioning an appropriate disincentive for law violations in the preparation of a civil tax case thus presents a much more difficult problem. The majority's solution is to impose the further sanctions of destroying the presumption of correctness of the respondent's determination and shifting the burden of going forward to him. However, it still leaves the burden of proof upon the petitioner.

Clearly the majority action is in the right direction. But I am not satisfied that such judicial sanctions will always fully implement the policy of deterrence and the need to protect the integrity of the judicial process which the courts have articulated as the foundation for the exclusionary rule. For example, there can be a situation where the respondent makes extensive use of illegally obtained evidence to develop a net worth statement and to make a determination based upon such statement. In Holland v. United States, 348 U.S. 121 [46 AFTR 943] (1954), the Supreme Court clearly indicated its chary regard for such statements. Thus, it stated (348 U.S. at 125) that "careful study indicates that it [a net worth statement] is so fraught with danger for the innocent that the courts must closely scrutinize its use." And it pointed out that "bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." See 348 U.S. at 128. To be sure, these comments were made in the context of a case involving a criminal jury trial where caution is the accepted order of the day, but I am convinced that similar caution is demanded where courts are confronted with evidence that a taxpayer's rights have been transgressed through law violations by public officials and where there are indications that such violations may well have provided the underpinning for the net worth statement and the resulting deficiency.

I believe that, in some instances, it may be necessary to go further than the majority, e.g., where there is a complicated or reconstructed factual situation such as a net worth case, or where there are substantial difficulties in determining what evidence is "tainted" and what is not. In such situations, a shift to the respondent of the burden of persuasion may be justified[3] in order to prevent the respondent from constructing a deficiency notice behind which he may hide, leaving the taxpayer to sustain his usual burden of proof. I recognize that it is a rare tax case in which the mind of the trier of the facts is in equilibrium and that, in this context, the location of the burden of persuasion, as distinguished from the burden of

to the necessity of filing petitions for review of jeopardy assessments in the Tax Court. Mr. Justice Harlan, speaking for the Court, held:

Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. * * * Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book. [Id., at 253 (dictum).]

The case was remanded to the district court for proceedings on the merits, leaving Blue *free* to pursue his Fifth Amendment claim through motions to suppress and objections to evidence.

[3] I am not unaware of the fact that the exercise of judicial discretion to shift the burden of proof may be inhibited by the fact that Rule 32 of the Court's Rules of Practice categorically places that burden on the petitioner and by the opposite inferences as to legislative intent which can be drawn from the fact that the Internal Revenue Code specifically places that burden on respondent in well-defined situations. See sections 534, 6902(a), and 7454. But, compare Helvering v. Taylor, 293 U.S. 507 [14 AFTR 1104] (1935).

going forward with the evidence, is usually of little consequence. But such situations can occur and I do not think this Court should abandon, under all circumstances,[3] an additional judicial sanction that could otherwise be available to it.[4]

I am not impressed with the argument that applying the protection of the Fourth Amendment and of accompanying judicial sanctions which may be found advisable will hamper the courts through delays in proceedings and increased litigation. A taxpayer, in order to invoke that protection, must establish that illegal means of obtaining evidence were used. See, e.g., Alderman v. United States, 394 U.S. 165, 183 (1969), United States v. Wade, 388 U.S. 218, 240, n. 31 (1967); Nardone v. United States, 308 U.S. 338, 341 (1939). A mere allegation that such action took place is insufficient. Moreover, the courts can accept a statement by the Government that its files reveal no evidence of any such action. See United States v. Hauff, — F.2d —, (C.A. 7, May 23, 1972, 29 A.F.T.R. 2d 1237, 72-1 U.S.T.C. par. 9433).

Nor is it material that the respondent's agents themselves did not conduct the illegal raid. It is enough that the evidence was acquired by them for local government officials who seized it in violation of the petitioners' constitutional rights. Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960); Weeks v. United States, 232 U.S. 383 (1914).

Any analogy to grand jury proceedings is beside the point. A comparison of such proceedings to the process by which the respondent arrives at his determination ignores the cardinal fact that, after an indictment, the burden of persuasion remains with the Government —a burden which is measured by a very high standard of proof, i.e., beyond a reasonable doubt—while, in the case of a determination by respondent, the burden of proof as to the underlying deficiency remains with the taxpayer. Similarly, in respect of sentencing and parole proceedings, the question is merely the measure of the penalty which the defendant should pay after the Government has first satisfied its burden of proof that a penalty should in fact be imposed.

I find the contention that the majority decision will benefit persons with unclean hands by relieving them from the responsibility of paying their share of taxes completely unacceptable. The fact of the matter is that respondent is afforded many weapons by means of which he can require such persons to pay the taxes they owe. He has the power of subpoena and he has available to him various broad techniques for developing a person's taxable income, e.g., net worth, bank deposits, and cash expenditures. The question in this case is not whether we are depriving respondent of the means of requiring petitioners to bear their share of the tax burden, but whether we should add a further weapon to respondent's arsenal at the expense of petitioners' constitutional rights. The choice between constitutional protections and the conveniences of litigation to the Government seems to me to be obvious, particularly in light of the fact, as the majority points out, that "[t]he costs to society of applying the exclusionary rule to civil tax cases are substantially less than in the criminal area."

The essence of a democratic society demands that the protection of law be accorded to *all* of its citizens, irrespective of any particular characterization which may be applicable to them. As I said in my dissenting opinion in Hugo Romanelli, 54 T.C. 1448, 1467 (1970):

> Our democratic institutions, including our judicial system, can survive the present onslaught upon them only if they are tempered with qualities of respect and understanding for the rights of the individual. This does not mean that we should confer an open-ended license for each person to do as he wants and to ignore his obligations to his fellow citizens, including the payment of taxes. Similarly, it does not mean that the Government, in the name of law and order, should be able to discharge its responsibilities to en-

[3] I note that, given respondent's stipulation herein as to the sources of his evidence, the majority action may well have the same practical effect as a shift in the burden of proof.

[4] I recognize that civil tax cases involving the use of illegally obtained evidence may also involve a determination of additions to tax for fraud as to which the respondent has the burden of proof. But the instant litigation bears mute witness to the fact that this is not always the case. Moreover, it cannot be gainsaid that the concomitant placing of the burden of proof as to the basic deficiency upon the taxpayer can result in a decision against him for a substantial amount even though respondent fails to carry his burden of proof as to the fraud issue. See Drieborg v. Commissioner, 223 F.2d 215, 216 [47 AFTR 1820] (C.A. 6, 1955), reversing on other grounds a Memorandum Opinion of this Court.

force its civil claims for taxes free of the procedural requirements of due process.

The continued concern that our citizens be protected from violations of law by public officials in the area of illegally obtained evidence is reflected in the enactment of the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 211) and the recent implementation of section 802 thereof (18 U.S.C. sec. 2515) in permitting a person to invoke its provisions as a defense against a contempt charge for failure to testify before a grand jury. See Gelbard v. United States, — U.S. — (June 26, 1972).

Neither the articulation of that concern in resolving the issues in this case, nor the characterization of that articulation as rhetoric, should obscure or change the fundamental constitutional demand that the Fourth Amendment be applied in a fashion which will meaningfully implement the objectives which it was designed to achieve.

FEATHERSTON and GOFFE, JJ., agree with this concurring opinion.

SIMPSON, J., dissenting: I, too, cherish the right of privacy, yet, when the reasons for and the reasons against are weighed, I am convinced that we are not required to extend the "exclusionary rule" to civil tax cases, nor is it wise for us to do so. I must dissent.

In its carefully reasoned opinion, the majority rests its conclusion in part on the classical reason for the exclusionary rule, that is, evidence is excluded in order to deter violations of the Fourth Amendment. Yet, serious doubts are now being expressed as to whether the application of the exclusionary rule in criminal cases does in fact accomplish that objective. Mr. Chief Justice Burger has said:

> I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. • • • But the hope that this objective could be accomplished by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream. Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the Suppression Doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective. • • • [Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 411, 415 (1971) Burger, C. J., dissenting.]

He also pointed out that many others who have studied the operation of the rule have judged it to be ineffective. One of the most extensive of those studies was conducted by Mr. Dallin H. Oaks, who summarized his findings as follows:

> As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution. What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police. The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.
>
> The use of the exclusionary rule imposes excessive costs on the criminal justice system. It provides no recompense for the innocent and it frees the guilty. It creates the occasion and incentive for large-scale lying by law enforcement officers. It diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police. Only a system with limitless patience with irrationality could tolerate the fact that where there has been one wrong, the defendant's, he will be punished, but where there have been two wrongs, the defendant's and the officer's, both will go free. This would not be an excessive cost for an effective remedy against police misconduct, but it is a prohibitive price to pay for an illusory one. • • • [Oaks, "Studying the Exclusionary Rule in Search and Seizure," U. of Chicago L. Rev. 665, 755-756 (1970).]

It is not for us to decide whether the exclusionary rule should continue to be applied in criminal cases, or whether

that rule should be replaced by some other device for the protection of the right of privacy.[1] However, we do have to decide whether the exclusionary rule should be extended and applied in a new class of cases—civil tax cases. Grave doubts have been presented as to the efficacy of the exclusionary rule, and surely we are not required to extend a rule of such doubtful utility. When others are seeking to restrict the rule and to find an alternative that better serves the public interests, we should not compound the present difficulties by undertaking to apply the rule to additional cases.

There is additional reason for doubting the deterrent effect of applying the exclusionary rule in this case. In Pizzarello v. United States, 408 F. 2d 579 [23 AFTR 2d 69-1575] (C.A. 2, 1969), the exclusionary rule was applied in a proceeding to enjoin a tax assessment, but in that case, the raid was conducted by Treasury agents. However, in this case, the raid was not conducted by the Internal Revenue Service. The intelligence agent who made the investigation learned of the raid by reading about it in a newspaper several days after it had occurred, and he had nothing to do with arranging it. Moreover, there is no reason whatsoever to believe that those officers who did conduct the raid were seeking information relating to the tax liability of Mr. Suarez. Even if the application of the exclusionary rule might have some effect when a raid is conducted by the Internal Revenue Service or when its agents participate in the raid, its application could have no deterrent effect when the raid is conducted by other officers without any purpose of securing tax information.[2] Applying the exclusionary rule will merely bestow upon Mr. Suarez the windfall of possibly relieving him from the tax liability on the income that he earned as a result of his allegedly illegal activities.

The majority also relies upon the concept that evidence secured in violation of the Fourth Amendment should not be admissible in any court proceeding for any purpose. To admit such evidence, the Court believes, would corrupt the judicial process. It is sometimes said that such evidence is "tainted," and Mr. Justice Brandeis warned about the "anarchy" that would follow from unrestrained police conduct. The use of such dramatic phrases tends to obscure the reasoning process. There is nothing inherently wrong with the evidence seized by the officers, and the courts, for them to function properly, ordinarily welcome and encourage the presentation of all relevant and reliable evidence. For that reason, the law generally favors the admission of all such evidence, unless there is some compelling reason for its exclusion. In considering the possible corruption of the judicial process, one should also bear in mind that the courts are being used as the "tool" of those whose hands are unclean—the exclusionary rule helps only those persons who have something to hide. Its application relieves them of their responsibility to account to society for their conduct. No one wishes to condone unrestrained police conduct, but in considering whether to extend the exclusionary rule to civil tax cases, one must weigh the possible danger of admitting the evidence in such proceedings against the harm to society that may occur if the evidence is excluded.

In our self-assessment tax system, all people are required to report their income and to pay the tax due thereon, however painful that process may be. Yet, how are the people going to react if they learn that those who are engaged in illegal activities are excused from paying a tax on their income because a court determines that the police acted improperly in securing evidence? Although the exclusionary rule has been applied in some civil proceedings, the consequences of doing so in tax cases will be altogether different. Applying the rule in a case involving an alleged violation of a housing code or involving a dispute over customs duties is not

[1] As an alternative to the exclusionary rule, the present Chief Justice has suggested a procedure for awarding damages to anyone who has been the victim of an illegal search and seizure. Such a remedy, he suggested, would be more effective because it could be invoked with respect to any illegal search.

[2] Such comment is not inconsistent with Elkins v. United States, 364 U.S. 206 (1960), in which it was held that evidence secured by an unlawful search by State officers was not admissible in a Federal case. That decision recognized that very often evidence may be indicative of a violation of both State and Federal laws, thus, in criminal cases, it matters not who conducted the unlawful search. I am not suggesting that any distinction should be based upon who conducts the raid, but I am suggesting that only when officers, be they officers of the State or of the Federal Government, are seeking tax information, will they be restrained by the prospect of the application of the exclusionary rule in civil tax cases.

going to have any widespread effect upon the compliance with those laws, but the application of the rule in civil tax cases raises the prospect of seriously undermining the practice of voluntary compliance with the tax laws.

In several cases, the Supreme Court has held that a grand jury must be free to consider whatever evidence comes to its attention; it must not be shackled in its operations by the nice rules of evidence. United States v. Blue, 384 U.S. 251 [17 AFTR 2d 1032] (1966); Lawn v. United States, 355 U.S. 339 [1 AFTR 2d 576] (1958); Costello v. United States, 350 U.S. 359 [48 AFTR 639] (1956). In Costello, the Court said at 362:

> The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory.
> • • •

In addition, there are other situations in which the courts have recognized that the advantages of using evidence, however obtained, outweighed any reasons for excluding it. In United States v. Shipani, 435 F. 2d 26 [26 AFTR 2d 71-466] (C.A. 2, 1970), evidence obtained by wiretapping could be considered for purposes of sentencing, and in United States Ex Rel. Sperling v. Fitzpatrick, 426 F. 2d 1161 (C.A. 2, 1970), similar evidence was considered in a parole revocation proceeding.

The role of the Commissioner is somewhat similar to that of the grand jury.[4] He has the grave responsibility of administering this vast tax system, including the responsibility of initiating proceedings to collect the tax from anyone who does not voluntarily disclose and pay his share. If the Commissioner learns, from reliable information, that a person has not complied with the tax laws, he should investigate and take the appropriate steps to see that such person does comply with the law. When the agent first learned of the raid from the newspaper, should he have closed his eyes to the possibility that Mr. Suarez may not have been reporting his income from his allegedly illegal activities? Perhaps there were other ways in which Internal Revenue could have made an investigation of the possibility, but it was offered direct evidence of such activities. It seems to me that the Commissioner and his staff are not required to close their eyes to indications of possible unreported income; indeed, in my opinion, it is their responsibility to accept that evidence and to make appropriate use of it in the performance of their official duties.

In deciding not to appy the exclusionary rule to proceedings before the grand jury, the Supreme Court recognized that if the rule was made applicable in such proceedings, it would delay them and result in increased litigation. Costello v. United States, supra at 350 U.S. 363. The Court's opinion in the case before us illustrates some of the difficulties that occur when we undertake to exclude evidence obtained by an allegedly illegal search. When a taxpayer seeks to invoke the rule, it then becomes necessary to determine whether there has been an illegal search. In this case, the Court concludes that the police were not excused

[3] In its recent decision in David Gelbard v. United States, 40 L.W. 4362 (6/26/72), the Supreme Court again approved its holding in Costello v. United States, supra, although it held that a witness could not be compelled to appear and testify before a grand jury with respect to information secured by an illegal wiretap.

[4] I am suggesting merely that the roles of the Commissioner and the grand jury are similar in that they both are expected to consider all available information in order to determine what actions should be initiated. I recognize that in a criminal case, the prosecutor still has the burden of establishing the defendant's guilt by admissible evidence; thus, the grand jury's consideration of evidence improperly obtained may not be decisive. However, the exclusionary rule has also been applied in the sentencing and parole revocation proceedings, even though the evidence secured by an improper search may be decisive in those situations.

from announcing their purpose before breaking down the door and entering because of their claimed fear of possible harm to their colleague, Barbara. It seems to me that such a conclusion totally ignores the reality of human emotions. It is one thing for us, sitting in the calm of our chambers, to conclude that the police did not act as a result of fear of harm to Barbara; if we had been on the scene, we might well acted as the police did. Despite the fact that Barbara was experienced and trained, they knew that she was somewhere in the clinic with a man who might become desperate, and he might have others to assist him in overpowering Barbara. Although the police knocked several times before breaking down the door, the fact that they could not enter may have increased their concern because they could not reach Barbara and provide her with any necessary assistance.

The majority also concludes that the police were at fault in failing to announce their purpose when they knocked. That conclusion also seems to me to ignore reality. When a person is engaged in the illegal activities allegedly performed by Mr. Suarez, and the police knock at his door, it would not require much imagination on his part to know why they were there; he could guess the answer with virtual certainty. To say that under those circumstances, the police should have stated their purpose, in my opinion, insists upon a technical compliance with the law which is not at all necessary to protect one's constitutional rights.

In conclusion, I suggest that whatever may be the justification for applying the exclusionary rule in criminal cases, there is sufficient doubt about its efficacy so that it should not now be extended to civil tax cases. Moreover, if it is extended at all to such cases, it should not be applied with respect to the information on which a notice of deficiency is based, and it should only be done when the Internal Revenue Service is involved in a violation of the Fourth Amendment. Finally, if the rule is applied to civil tax cases, it should be done in the manner suggested by the American Law Institute by excluding the evidence only when there is a finding that the violation was substantial. See Am. Law Inst., A Model Code of Pre-Arraignment Procedure, Proposed Official Draft No. 1, sec. SS 290.2(2) (1972). Such an approach enables the courts to protect adequately an individual's constitutional rights, without unnecessarily interfering with the operations of the Government and its officials.

RAUM, *J.*, agrees with this dissent.

[¶ 58,79] 58 TC No. 79. ARIE S. CROWN, ET AL.[1] Docket Nos. 3359-70 thru 3366-70. 8-14-72. Opinion by SIMPSON, *J.* Year 1966. Deficiencies redetermined.

CORPORATE DISTRIBUTIONS — Dividends and dividend-type distributions—taxation of distribution. Capital gains treatment denied shareholder for stock redemption proceeds. Payment of dividends on common stock gave rise to legally enforceable right to payment of dividends on preferred stock. Portion of the proceeds received in satisfaction of this right was taxable as dividend. *Ref:* 1972 P-H Fed. ¶ 17,062(5).

*Official Tax Court Syllabus*

On March 10, 1966, GD paid a dividend on its common stock, without paying or setting aside for payment a dividend on its preferred stock for the first quarter of 1966. On March 14, 1966, a plan for the redemption of the preferred stock was adopted, and the redemption price expressly included an amount representing the unpaid dividend for the first quarter of 1966.

Held: (1) Under the terms of GD's certificate of incorporation, the dividends on the preferred stock must be declared and paid, or set apart for payment, before common stock dividends are declared or paid;

(2) As a result of the payment of the dividends on the common stock, the preferred shareholders had a legally enforceable right to compel GD to pay the dividends on the preferred stock; and

(3) The portion of the proceeds received by a preferred shareholder in satisfaction of his rights against GD is taxable as a dividend under sec. 301, I.R.C. 1954.

Byron S. Miller, Alan L. Reinstein, and Merrill A. Freed, for the petitioners.

[1] Cases of the following petitioners are consolidated herewith: James S. Crown, docket No. 3360-70; Patricia A. Crown, docket No. 3361-70; Daniel M. Crown, docket No. 3362-70; Debra L. Crown, docket No. 3363-70; Nancy J. Crown, docket No. 3364-70; Richard C. Goodman, docket No. 3365-70; and Laurie J. Crown, docket No. 3366-70.

APPENDIX N

UNITED STATES TAX COURT
WASHINGTON

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| EFRAIN T. SUAREZ and ZENAIDA SUAREZ, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent. | Docket No. 4196-67. |

ORDER

On August 10, 1972, the Court filed its Findings of Fact and Opinion in the above-captioned matter (58 T.C. No. 78), relating to several pretrial motions filed by the petitioners. Pursuant to the conclusions therein reached, it is

ORDERED:

(1) Motion to Strike the Affirmative Allegations of the Amended Answer and Judgment on the Pleadings: The portion of the motion relating to striking affirmative allegations in the amended answer is GRANTED, and the portion of the motion relating to judgment on the pleadings is DENIED.

(2) Motion to Strike and Suppress Evidence and to Quash Subpoenas and Subpoenas Duces Tecum: The motion is GRANTED.

(3) Motion to Quash the Statutory Notice of Deficiency and to Dismiss for Lack of Jurisdiction: The motion is DENIED.

(4) Motion to Return Property: The motion is DENIED.

(5) Motion to Shift the Burden of Proof: The motion is DENIED. It is

U.S. GOVERNMENT PRINTING OFFICE 16—63000-6

UNITED STATES TAX COURT
WASHINGTON

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| EFRAIN T. SUAREZ and ZENAIDA SUAREZ, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent. | Docket No. 4196-67. |

Page 2 - ORDER

FURTHER ORDERED:

(1) That the burden of producing and going forward with the proof is shifted to the respondent to establish the existence of a deficiency with evidence which is not the fruit of an illegal search and seizure; and

(2) That the respondent shall have leave to file, within 30 days of the date of this order, a further amended answer containing a statement of any facts upon which he will rely when the trial resumes to sustain his asserted deficiency.

(Signed) AUSTIN HOYT

Judge

Dated:

Washington, D. C.
August 16, 1972

U.S. GOVERNMENT PRINTING OFFICE 16—63888-6

## APPENDIX O

61 T. C. No. 87

UNITED STATES TAX COURT

EFRAIN T. SUAREZ and ZENAIDA SUAREZ, Petitioners v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 4196-67. Filed March 26, 1974.

Held, where the burden of producing and going forward with proof has been shifted to the respondent and he has been ordered to present independent, constitutionally-untainted evidence to sustain asserted deficiencies, the respondent's determination cannot be sustained after he refuses to present any evidence and declines to go forward with the proof.

Martin J. Nash, for the petitioners.

Dennis J. Fox, for the respondent.

OPINION

HOYT, Judge: Petitioners resided in Miami, Florida, when they filed their petition herein. They filed joint Federal income tax returns for 1963 and 1964, in which they reported very substantial gross income from Efrain's medical practice and claimed numerous expenses and deductions. Since Zenaida Suarez is a party hereto merely because she joined in these returns, Efrain will sometimes hereinafter be referred to as the "petitioner." The respondent has determined the following deficiencies in the petitioners' income tax and has imposed the following penalties:

| Taxable Year Ended | Deficiency | Penalty [1] (Section 6653(a)) |
|---|---|---|
| December 31, 1963 | $354,959.96 | $17,748.00 |
| December 31, 1964 | 358,649.62 | 17,932.48 |

In a statement attached to the statutory notice of deficiency respondent explained that it had been determined that the gross receipts from petitioner's business totaled $528,888.58 in 1963 and $609,877.67 in 1964 in lieu of $107,938 in 1963 and $129,064 in 1964, as reported on petitioners' returns. It was also determined that part of

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[1] Unless otherwise noted, all statutory references are to the 1954 Internal Revenue Code, as amended.

the underpayment of tax for the two taxable years was due to negligence or intentional disregard of rules and regulations, giving rise to the assertion of the 5 percent addition to tax provided by section 6653(a) in each of the taxable years involved. No other adjustments were made by the statutory notice, and the deficiencies and penalties determined resulted entirely from the increased gross receipts described above.

Only a brief summary of the pertinent facts will be made herein in light of our earlier opinion in this case. The Findings of Fact and Opinion appearing in Efrain T. Suarez, 58 T.C. 792 (1972), are incorporated herein by this reference.

In November, 1963, the Miami Police Division and the State Attorney's Office of Dade County, Florida, suspecting that illegal abortions were being performed at a clinic operated by petitioner, determined to develop evidence for prosecution of those at the clinic found to be involved in such illegal acts. There followed a four to six-week investigation, culminating in detailed planning for a raid at the premises of the clinic on January 3, 1964.

To implement the planned raid two policewomen (Barbara Williams and Myrtle Ellison) gained entrance to the clinic, pursuant to a pre-arranged appointment,

on the pretext of securing the abortion of a pregnancy feigned by Barbara. When the stage was set by the payment of the prescribed fee (in bills of recorded seriality) and the initiation of the preliminary arrangements for Barbara's purported operation, Myrtle excused herself for breakfast. Once outside the clinic she summoned other police officers and agents of the state attorney's office, who were awaiting her signal, and informed them that the money had changed hands and the petitioner was preparing to attempt the "arranged" abortion on Barbara.

The officers entered the public waiting room and knocked on the closed inner door to the examining rooms, which had been relocked after Myrtle's exit. After announcing their identities, but not their purpose, and receiving no reply, they knocked again and immediately proceeded to break the door down. In spite of weeks of preparation for the raid, no warrants were obtained either for arrests or for a search of the clinic.

The petitioner and several other employees were then arrested and the premises searched. In the course of the search petitioner's daily records, containing details of the clinic's business in 1963, were discovered and seized.

The seized records and evidence obtained in the raid were the basis for an information returned against petitioner for violation of Florida statutes prohibiting abortions. After trial in which this same evidence was used, petitioner was convicted in 1965, but later following affirmation of the conviction in the Florida courts and denial of a writ of certiorari by the United States Supreme Court, he was released on a writ of habeas corpus by the United States District Court for the Southern District of Florida in 1969. That court found that the forced entry at the clinic was illegal and the evidence upon which the conviction was based was obtained as a result of an unlawful search and seizure violative of the Fourth Amendment to the United States Constitution. The judgment of conviction was vacated and petitioner set free. He was never retried in the Florida courts.

Shortly after the raid the daily records seized from the clinic were made available by the Miami law enforcement officials, who had conducted it, to agents of the respondent. The deficiency determined by respondent for 1963 was based solely on an analysis of these records and leads obtained therefrom. Since

no records were available for 1964, respondent based the deficiency asserted for that year on projections he made from the 1963 records seized in the raid. Respondent made no independent investigation, audit or examination whatever to determine petitioners' income or the correctness of their returns for either year before us and has stipulated that his determination was based solely on the records seized in the 1964 clinic raid and leads derived therefrom.

The petitioners filed several motions in advance of trial in which they alleged that the respondent based his determination upon evidence which was obtained from them in violation of their rights under the United States Constitution. Hearings were held thereon, evidence was submitted, arguments were made and briefs filed. In an opinion filed on August 10, 1972, and published at 58 T.C. 792, we held that Fourth Amendment proscriptions applied in a civil tax case.[2] On the record before us we reached the same conclusion as that reached by the United States District Court for the Southern District of Florida in the habeas corpus

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[2] Compare Romanelli v. Commissioner, 466 F.2d 872 (C.A. 7, 1972), reversing 54 T.C. 1448 (1970), in which Fifth Amendment protections were extended to civil tax cases, and evidence obtained in violation of petitioner's Fifth Amendment rights was excluded as an appropriate and desirable deterrent. See also Mapp v. Ohio, 367 U.S. 643, 646-647 (1961), holding and quoting with approval, Boyd v. United States, 116 U.S. 616, 630 (1886), that the doctrines of the Fourth and Fifth Amendments run "almost into each other" and apply to all invasions of the sanctity of a man's home and the privacies of life so that any forcible extortion of a man's testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of those Amendments.

proceeding before it in 1969. We concluded that the forced entry, raid and seizure of evidence without warrants in 1964 were illegal and in violation of petitioner's Fourth Amendment rights. We then pointed out that in addition to suppression of the tainted evidence in this case, in which the burden of proof rests upon the petitioner to show error in respondent's determination, further action should be taken to effect a disincentive to the use of constitutionally tainted evidence and also to protect judicial integrity.[3] We finally concluded therefore that the presumption of correctness normally attached to respondent's determinations of deficiencies was destroyed and that the burden of producing and going forward with the proof in this case shifted to the respondent, who had the duty to present independent, untainted evidence to sustain his asserted deficiencies.

On August 16, 1972, pursuant to the above-mentioned prior opinion herein, we ordered:

> (1) That the burden of producing and going forward with the proof is shifted to the respondent to establish the existence of a deficiency with evidence which is not the fruit of an illegal search and seizure; and
>
> (2) That the respondent shall have leave to file, within 30 days of the date of this order, a further amended answer containing a statement of any facts upon which he will rely when the trial resumes to sustain his asserted deficiency.

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[3] See also Paulsen, "The Exclusionary Rule and Misconduct by the Police," 52 J. Crim. L.C. & P.S. 255 (1961).

The respondent did not take advantage of the leave granted by the Court to file an amended answer. Following further hearings on other motions and pursuant to order and notice, trial of the case was held on January 31, 1973. The respondent declined to proceed and did not produce or go forward with evidence to establish the existence of a deficiency, if any, or the amount thereof for either year before us.

As a result of the respondent's failure to file an amended answer and to go forward with proof at the trial, we are left with a statutory notice of deficiency bereft of its usual presumption of correctness, the pleadings of the parties and the record of all proceedings herein. The case stands before us without an iota of acceptable evidence to sustain the respondent's asserted deficiencies.

We think the respondent's duty in this case has been made quite clear. In our prior opinion in this matter, at page 814, we pointed out that--

> the respondent has a duty in the case at bar not only to cleanse the evidence but also, if he wishes to be sustained in his determination herein, to present evidence to support it which is free of unconstitutional taint. [Emphasis added.]

We have given the respondent every opportunity to present such evidence, and he has chosen not to do so. He still contends that, because the burden of proof has not shifted, it is incumbent upon the petitioners to go forward with the evidence, and not the respondent.

It is clear from our earlier opinion that we regarded the petitioners as having shown error in the correctness of the statutory notice here involved and the deficiencies determined therein. We held that the petitioners had established the constitutionally deficient nature of the statutory notice, and we ordered the respondent to go forward with the evidence "if he wishes to be sustained in his determination herein * * *." At that time the petitioners must be regarded as having met their burden of proof, so as to be in the same posture as any taxpayer before us who has established a prima facie case.

In Paul J. Byrum, 58 T.C. 731 (1972), we concluded that where a petitioner has introduced sufficent evidence to establish a prima facie case, the burden of producing proof then shifts to respondent to present evidence to the contrary. If he fails to do so he cannot prevail. We stated (at page 735):

> In the circumstances of this case, we think the evidence produced by petitioner was at least sufficient to establish prima facie that petitioner's Chappel stock became worthless in 1967. The burden thus shifted to respondent to present evidence to the contrary. Yet he called no witnesses, offered no exhibits to refute the case presented by petitioner, and developed nothing of significance, through cross-examination. On this record, we hold that petitioner is entitled to the disputed deduction.

Here, as in Byrum, petitioners have established a prima facie case and the respondent has failed to go forward with evidence when the burden of doing so has shifted to him, and we have ordered him to produce evidence to establish deficiencies if he is to be sustained. In light of our earlier opinion in this case, the authorities cited therein, our opinion in Paul T. Byrum, supra, and the entire record before us, we must conclude and hold that the respondent cannot be sustained in his determination herein.[4] In the circumstances of this case petitioners must prevail.

Decision will be entered for the petitioners.

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[4] At the trial the respondent filed a "Motion to Dismiss for Lack of Prosecution or, Alternatively, for Judgment on the Record." Consistent with our discussion herein, we can only conclude that it is respondent who has failed to prosecute his case after having been ordered to proceed with proof and ample opportunity thereafter to prepare for trial; that motion is DENIED. At the trial, the petitioners made an oral motion for judgment on the record. That motion is, in effect, hereby GRANTED.